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IN THE

Supreme Court of the United States

October Term, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
(a) Nature of the action	4
(b) The decision of the District Court	5
(c) The decision of the Court of Appeals	6
REASON FOR ALLOWANCE OF THE WRIT	7
I—The Court of Appeals' decision is in conflict with applicable New York law	8
(a) The new formulation is contrary to existing New York attachment law	10
(b) The new formulation is unworkable	14
(c) The new formulation is contrary to New York public policy with respect to suits against governmental instrumentalities	17
II—The precedent established by the Court of Appeals is of far-reaching importance	20
Conclusion	21
PRAYER FOR RELIEF	22
APPENDIX A	
Opinion of the District Court	1a
Original opinion of the Court of Appeals	13a
I—The Facts	15a

PAGE

II—The Law

A Preliminary 28a

B Summary of Reasoning of Opinion 31a

C Under New York Law the Activities of the District Were Governmental and Not Proprietary 33a

D Will the Levy Upon the Funds on Deposit with Banker Trust Company Interfere with the Governmental Activities of the District? 43a

First opinion on petition for rehearing 53a

Second opinion on petition for rehearing 54a

Order denying petition for rehearing *en banc* 58a

APPENDIX B

New York Civil Practice Act 59a

New York Civil Practice Law and Rules 60a

Preamble of the statute of the State of Washington pursuant to which petitioner was established 61a

Act of Congress authorizing the activity giving rise to this lawsuit 62a

Washington statutes authorizing suit against petitioner and establishing that its property is not subject to execution 66a

APPENDIX C

List of representative bonds issued by governmental instrumentalities to finance projects, where construction funds were held by New York banks pursuant to provisions similar to those here involved 68a

TABLE OF AUTHORITIES

PAGE

Cases

(a) Decisions of this Court

East St. Louis v. United States ex rel. Zebley (1884) 110 U. S. 321 14

Larson v. Domestic & Foreign Commerce Corp. (1949) 337 U. S. 682 ..... 10, 11

(b) Decisions of the New York Courts

Benz v. New York State Thruway Auth. (1961) 9 N. Y. 2d 486, 174 N. E. 2d 727, cert. dismissed (1962) 369 U. S. 147 17

Brown v. Trustees, Hamptonburg School Dist. (1952) 303 N. Y. 484, 104 N. E. 2d 866 17

Donner-Hanna Coke Corp. v. Eberhardt (Sup. Ct. Erie Co. 1935) 156 Misc. 41, 280 N. Y. Supp. 607 ..... 8, 10, 11

Doyle v. City of Astoria, Ore. (Sup. Ct. N. Y. Co. 1932) 147 Misc. 127, 262 N. Y. Supp. 572, aff'd no op. (1st Dept. 1933) 238 App. Div. 833, 262 N. Y. Supp. 973 8

Harman v. City of Ft. Lauderdale (Sup. Ct. N. Y. Co. 1929) 134 Misc. 133, 234 N. Y. Supp. 196 8

Kelly v. City of Yonkers (2d Dept. 1934) 242 App. Div. 798, 274 N. Y. Supp. 781 ..... 11n

Leonard v. City of Brooklyn (1877) 71 N. Y. 498 ..... 8, 10

PAGE

New York Post Corp. v. Moses (1961) 10 N. Y. 2d 199, 176 N. E. 2d 709 ..... 17, 18

Sheehy v. Madison Square Garden Corp. (1934) 266 N. Y. 44, 193 N. E. 633 ..... 13n

State of Washington v. Harvey (1st Dept. 1960) 10 A. D. 2d 691, 198 N. Y. S. 2d 897, appeal dism'd 8 N. Y. 2d 865, 168 N. E. 2d 715, stay pending certiorari denied by Mr. Justice FRANKFURTER on July 5, 1960 ..... 5n

Van Horn v. Kittitas County, Wash. (Sup. Ct. N. Y. Co. 1899) 28 Misc. 333, 59 N. Y. Supp. 883, aff'd on opinion below (1st Dept.) 46 App. Div. 623, 61 N. Y. Supp. 1150 8

(c) *Other Cases*

Board of Directors of St. Francis Levee District v. Bodkin Bros. (1902) 108 Tenn. 700, 69 S. W. 270 18n

Eastern Union Co. v. Moffat Tunnel Improvement Dist. (1934) 36 Del. 488, 178 Atl. 864 ..... 18n

Murdock v. City of Asbury Park (S. D. N. Y. 1942) 48 F. Supp. 18 9

National Shawmut Bank v. City of Waterville (1934) 285 Mass. 252, 189 N. E. 92 ..... 18n

O'Toole v. United States (D. Del. 1952) 106 F. Supp. 804, modified (3rd Cir. 1953) 206 F. 2d 912 ..... 18n

Parks Co. v. City of Decatur, Ill. (6th Cir. 1905) 138 Fed. 550 ..... 18n, 19n

PAGE

State v. Blake (1933) 88 Utah 584, 20 P. 2d 871, modified (1936) 88 Utah 600, 56 P. 2d 1347 ..... 13n

W. K. Terry & Co. v. Hyde County, N. C. (1929) 33 Ohio App. 118, 168 N. E. 562 ..... 18n

Statutes and Rules

New York Civil Practice Act
§912 ..... 3, 8

New York Civil Practice Law and Rules
5201(a)(b) 3n
6202 ..... 3n

New York Court of Claims Act
§20(3)(5) 8
§20(8) 17

Rev. Code Wash. 54.16.110 17

28 U. S. C. §1254(1) 2

Supreme Court Rules
Rule 19 1(b) 7

Federal Rules of Civil Procedure
Rule 4(e) 21

Other Authorities

10 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE (1954) §91 p. 135 9

1 DILLON, MUNICIPAL CORPORATIONS 248 (5th ed. 1911) 8

FORDHAM, LOCAL GOVERNMENT LAW 623 (1949) 8

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PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Public Utility District No. 2 of Grant County, Washington, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

Opinions were rendered by the District Court for the Southern District of New York (GREGORY F. NOONAN, D. J.), and by the Court of Appeals (MEDINA, WATERMAN and SMITH, C. JJ.).

The District Court's opinion is reported in 207 F. Supp. 443 and is printed in Appendix A hereto, *infra* at pp. 1a-12a. The Court of Appeals rendered three separate opinions: one, per MEDINA, C. J., with its original decision of April 22, 1963; a second, *per curiam* dated May 17, granting—on the ground of the novelty of some of the questions discussed in the original opinion—a petition for rehearing to the extent of allowing further and supplemental briefs; and a third, *per curiam* dated June 19, denying the petition for rehearing. All of these opinions are reported in 319 F. 2d 94, 113 and are printed in Appendix A, *infra* at pp. 13a-52a, 53a, 54a-57a. By order entered August 6, a copy of which is printed in Appendix A, *infra* at p. 58a, the full court denied a petition for rehearing *en banc* (FRIENDLY, C. J., not participating; CLARK, MOORE, and HAYS, C. JJ., dissenting and voting to grant rehearing *en banc*).

Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1963. A petition for rehearing or in the alternative for rehearing *en banc* was filed on May 7. The original panel denied the petition for rehearing on June 19, and on August 6 the full court (three judges dissenting) denied the alternative petition for rehearing *en banc*. The last day for filing this petition was, by order of Mr. Justice HARLAN dated August 15, fixed at November 4, 1963.

28 U. S. C. §1254(1) confers jurisdiction on this Court.

Question Presented for Review

The Court of Appeals held that governmental property owned by a municipal corporation of the State of Washington and devoted to public use may, in some circumstances, be attached in New York for the purpose of obtaining jurisdiction over such municipal corporation. This holding raises the following question:

> Did the Court of Appeals, in sanctioning such attachment of governmental property devoted to public use, decide an important state question in a way in conflict with applicable New York law?

Statutory Provisions Involved

New York Civil Practice Act §912[1] defines the circumstances in which property may be attached. The section is set forth in Appendix B, *infra* at p. 59a. So far as here pertinent, it provides:

> "The sheriff must execute the warrant immediately, by levying * * * upon so much of the property of the defendant, within his county, not exempt from levy and sale by virtue of an execution * * *."

Under New York decisional law, governmental property devoted to public use is—absent express statutory authority—exempt from levy and sale by virtue of an execution (*infra*, pp. 10-13).

The preamble of the statute of the State of Washington pursuant to which petitioner was established, the act of

1. The Civil Practice Act was in effect at all times here relevant. On September 1, 1963 it was superseded by the Civil Practice Law and Rules (officially cited as "CPLR"). The pertinent provisions of the former Civil Practice Act §912 are now found—without change in substance—in CPLR 6202 and CPLR 5201(a) and (b). Those sections are set forth in Appendix B, *infra* at p. 60a.

Congress authorizing the particular activity giving rise to this lawsuit, and the Washington statutes authorizing suit against petitioner and establishing that its property is not subject to execution—all of which were noted by the Court of Appeals (319 F. 2d at 97, 97-98, 96, *infra* at pp. 16a, 17a-18a, 16a)—are set forth in Appendix B, *infra* at pp. 61a, 62a-65a, 66a-67a.

Statement of the Case

(a) Nature of the action

Petitioner, Public Utility District No. 2 of Grant County, Washington, is a municipal corporation of the State of Washington, organized for the purpose of conserving the water and power resources of that State. In furtherance of this purpose and pursuant to authorization from the Congress, petitioner undertook to build and operate the Priest Rapids Hydro-Electric Project in order to provide flood control and navigation on the Columbia River and to produce public power.

Respondent, a Delaware business corporation, commenced this action against the petitioner in the Supreme Court of the State of New York by attaching certain funds which—as both courts below have found—petitioner had derived from and was using in furtherance of its governmental functions. Such funds consist of two accounts which Bankers Trust Company, a New York bank, is holding as "Construction Fund Trustee" pursuant to arrangements made with the underwriters of a bond issue to finance one part of the Priest Rapids Hydro-Electric Project. More than $17,000,000 is presently under attachment.

The warrant of attachment was issued out of the Supreme Court of New York County. Service of the summons and complaint was subsequently made upon the petitioner at Coulee City in the State of Washington. The action was removed to the District Court on the ground of diversity of citizenship.

Respondent is a general contractor who had been engaged by the petitioner to construct one of the dams for the Priest Rapids Hydro-Electric Project. The action, demanding judgment in the sum of $17,391,012, is on the construction contract. Petitioner declined payment on the grounds that respondent had not satisfactorily performed its contract, and that petitioner's officers had been thwarted by respondent in their investigation into charges—made in a grand jury presentment[2]—of fraud perpetrated by respondent with respect to its contract (see Joint Appendix, pp. 58a-65a).

(b) The decision of the District Court

The District Court vacated the attachment and set aside the subsequent service of summons on the ground that the petitioner, a political subdivision of the State of Washington, had derived the attached property from the performance of governmental activities and was using it in furtherance of governmental functions.

The District Court thus stated its understanding of New York law (207 F. Supp. 445, 446, *infra* at pp. 5a, 7a):

> "Whether or not the property of a municipal corporation is subject to foreign attachment appears to

2. See *State of Washington* v. *Harvey* (1st Dept. 1960) 10 A. D. 2d 691, 198 N. Y. S. 2d 897, appeal dism'd 8 N. Y. 2d 865, 168 N. E. 2d 715, stay pending certiorari denied by Mr. Justice FRANKFURTER on July 5, 1960.

depend upon whether such property is derived from a proprietary function engaged in by the municipal corporation. The law is clear in New York that funds of a municipal corporation collected through ordinary governmental means for local purposes cannot be the subject of attachment.

• • •

"Where, however, it has been shown that property of a municipal corporation has been acquired through a proprietary venture, the courts in New York have allowed a levy of attachment on such property."

After a review of the evidence, the District Court stated the conclusion which impelled it to vacate the attachment (207 F. Supp. at 447, *infra* at p. 12a):

"• • • it is the opinion of this court that Public Utility District #2 is a municipal corporation not engaged in a private and proprietary venture. As such the monies, held by the Bankers Trust Company, in two funds, are not subject to attachment."

(c) The decision of the Court of Appeals

The Court of Appeals sustained the District Court's finding as to the governmental origin and use of the attached property (319 F. 2d at 104-109, *infra* at pp. 33a-43a). It reversed and remanded because, in its view of New York law, such governmental property is not exempt from attachment unless a New York court (or a District Court sitting as a state court in a diversity case) should—in addition to finding the property to be devoted to public purposes—rule that seizure of such property substantially interferes with some essential governmental function (319 F. 2d at 109-113, *infra* at pp. 43a-52a).

The Court of Appeals deemed it unfortunate that no New York authority had attempted "a thorough exposition

of the basic principles" concerning the exemption of governmental property from attachment (319 F. 2d at 110, *infra* at p. 46a). It undertook to make its own "independent analysis" (319 F. 2d at 104, *infra* at p. 32a). As a result of such independent analysis, the Court developed and formulated its above stated view of the law (319 F. 2d at 104, 113, *infra* at pp. 32a, 52a).

The Court of Appeals remanded the action, with instructions that the District Court undertake a "penetrating and thorough study" of the effect of permitting the attachment to stand (319 F. 2d at 104, 113, *infra* at pp. 33a, 51a-52a). Such remand was deemed necessary because "the critical issue" had been "submerged and disregarded by all concerned" (319 F. 2d at 113, *infra* at p. 52a). This situation, the court noted, was "one of the very infrequent by-products of the decisional process, when new law is being developed and formulated" (*ibid.*).

Reason for Allowance of the Writ

The Court of Appeals has decided—in a way in conflict with applicable New York law—an important state question [SUP. CT. RULE 19 1(b)], in that:

> The Court of Appeals erred in departing from settled New York law and applying its own newly "developed and formulated" doctrine as one which New York courts would supposedly adopt (*infra*, pp. 8-18); and
>
> The decision is important because it affects every instrumentality of another state having funds on deposit in New York, and results in an unwarranted extension of the jurisdiction of federal courts sitting in New York (*infra*, pp. 19-21).

I

The Court of Appeals' decision is in conflict with applicable New York law.

A warrant of attachment may, in New York, be levied only upon property that is not exempt from levy and sale by virtue of an execution (CPA §912, *supra*, p. 3). In the absence of express statutory authority, the funds of state instrumentalities are so exempt—at least where such funds are devoted to public and governmental use. *Leonard* v. *City of Brooklyn* (1877) 71 N. Y. 498; *Donner-Hanna Coke Corp.* v. *Eberhardt* (Sup. Ct. Erie Co. 1935) 156 Misc. 41, 280 N. Y. Supp. 607; FORDHAM, LOCAL GOVERNMENT LAW 623 (1949); 1 DILLON, MUNICIPAL CORPORATIONS §248 (5th ed. 1911); see N. Y. COURT OF CLAIMS ACT, §20(3)(5). For example, Dean Fordham's treatise, *supra*, at the page cited, states:

> "Nowhere is there dissent from the proposition that property of a unit of local government presently devoted to a public use and appropriate to that end is free from execution."

The resulting rule is that the property of a governmental instrumentality can be attached only if it be shown that such property is being used in a "proprietary" as opposed to a "governmental" capacity. *Van Horn* v. *Kittitas County, Wash.* (Sup. Ct. N. Y. Co. 1899) 28 Misc. 333, 59 N. Y. Supp. 883, aff'd on opinion below (1st Dept.) 46 App. Div. 623, 61 N. Y. Supp. 1150; *Harman* v. *City of Ft. Lauderdale* (Sup. Ct. N. Y. Co. 1929) 134 Misc. 133, 234 N. Y. Supp. 196; *Dogle* v. *City of Astoria, Ore.* (Sup. Ct.

N. Y. Co. 1932) 147 Misc. 127, 262 N. Y. Supp. 572, aff'd no op. (1st Dept. 1933) 238 App. Div. 833, 262 N. Y. Supp. 973; *Murdock v. City of Asbury Park* (S. D. N. Y. 1942) 48 F. Supp. 18; 10 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE (1954) 91 at p. 135.

CARMODY-WAIT, *supra*, a standard reference work of New York practice, succinctly states the applicable rule at the page cited:

> "Property and property rights held by a municipal corporation in a private and proprietary capacity, *as distinguished from a governmental and political capacity*, are attachable." (Italics supplied.)

The Court of Appeals imposed an additional condition upon exemption of governmental property. Under the newly formulated doctrine, it is not sufficient to find—as did both courts below—that the property is held in a governmental and political capacity. There must be an additional finding— on a case-by-case basis—that the particular seizure attempted would substantially interfere with the public duties of the governmental owner. In summarizing this novel doctrine, the Court of Appeals observed (319 F. 2d at 113, *infra* at p. 52a):

> "We venture the prediction that the rule formulated by us this day, to the effect that a levy under an attachment in a *quasi-in-rem* proceeding against an out-of-state governmental instrumentality will be permitted to stand unless its effect will be substantially to interfere with the performance of the public duties of such instrumentality, rests on a solid foundation and will endure."

It is petitioner's position (a) that the new formulation is contrary to existing New York attachment law, and that no New York court would adopt such a formulation because (b) it is unworkable and (c) it flies in the face of a well-established and important New York public policy respecting suits against governmental instrumentalities.

(a) The new formulation is contrary to existing New York attachment law.

The newly formulated doctrine—that exemption of governmental property from levy and attachment depends not only upon the governmental nature and use of the property, but also requires a case-by-case evaluation of the effect of the particular seizure attempted—is refuted by some of the very authorities cited in its support. See *Leonard v. City of Brooklyn, supra*, 71 N. Y. 498; *Donner-Hanna Coke Corp. v. Eberhardt, supra*, 156 Misc. 41, 280 N. Y. Supp. 607, 609 (cited by the court below, 319 F. 2d at 111, 110 *infra* at pp. 48a, 46a; cf. *Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U. S. 682, 703-704 (cited by the court below, 319 F. 2d at 111, *infra* at p. 47a). Those cases establish that where exemption from judicial interference has been established for a particular category of governmental property or activity, such exemption is absolute and does not—and should not—depend on a case-by-case evaluation of any particular interference.

Leonard v. *City of Brooklyn, supra*, is the New York decision which establishes that governmental property devoted to public use is, absent an express statute, exempt from levy of execution. In that case, the New York Court of Appeals did not go into the question whether the particular property involved was essential to the City's function.

On the contrary, after a discussion of public policy considerations, the court laid down a general rule concerning exemption of property held for public use. It ruled all such property to be exempt, absent specific statutory authorization for a levy. Thus, the court ruled (71 N. Y. at 501):

> "* * * there is no ground for holding that it was the intention of the law-makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express [statutory] provision to that effect."[3]

Donner-Hanna Coke Corp. v. *Eberhardt, supra*, involved a claim for refund of taxes improperly assessed by the City of Buffalo. The court granted mandamus on the ground that judgments against municipal bodies "are not enforceable by execution" (156 Misc. at 42-43, 280 N. Y. Supp. at 609). The amount of the tax claim is not disclosed, but it is inconceivable that the court was under the impression that paying a single taxpayer's claim would substantially interfere with the performance of Buffalo's public duties. It is clear, therefore, that the court considered the exemption to be absolute.

In *Larson* v. *Domestic & Foreign Commerce Corp., supra*, the question was whether a United States District Court had jurisdiction to enjoin an officer of the War Assets Administration. At the pages cited by the court below, this Court outlined the "strongest reasons of public policy" which require that an agency of government

3. There exists express statutory provision for levy of execution against certain cities in specified circumstances after final judgment. See, *e.g.*, *Kelly* v. *City of Yonkers* (2d Dept. 1934), 242 App. Div. 798, 274 N. Y. Supp. 781.

should not be subject to injunction. However, the Court refused to consider whether those policy reasons were applicable to the specific case before it. Thus, speaking through Mr. Chief Justice Vinson, the Court observed (337 U. S. at 704-705):

> "We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case."

In addition to its reliance upon opinions such as those discussed above, the Court of Appeals noted that the New York Civil Practice Act may allow the garnishment of a debt owed by a governmental body (319 F. 2d at 112, *infra* at p. 49a). It therefore concluded that there was no reason to suppose that New York would, in a situation such as the one at bar, object to attachment of a governmental fund (*ibid.*). The conclusion does not follow from the premise. Rules concerning garnishment of debts owing by a governmental body are irrelevant to any consideration of the law of attachment of governmental property.

Garnishment of a debt *owed by* a governmental body is wholly different in theory and effect from attachment of governmental property. Such garnishment—while it might cause bookkeeping inconvenience—cannot prevent the continued use of governmental property. It results only in the substitution of one creditor of the governmental body for another. No governmental property is taken from the custody of its owner.

Attachment of governmental property, on the other hand, immediately withdraws from public use for the plain-

tiff's benefit the specific governmental asset selected by plaintiff. Where the attachment, like the one at bar, is incidental to an attempt to obtain jurisdiction, the property is placed *in custodia legis* and the government is deprived of its use for an indefinite period of time, even though the plaintiff be ultimately defeated in the action.

To summarize: In New York, property exempt from levy of execution may not be attached. Public-purpose governmental property is exempt from levy of execution in the absence of express statutory authority. There exists no such statutory authority applicable to the case at bar. It follows that petitioner's public-purpose property may not be attached, and that there is no basis in law for the contrary doctrine newly "developed and formulated" by the Court of Appeals.[4]

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4. So far as we have been able to determine, no American court has ever before required that inquiry into possible interference—substantial or otherwise—with essential public functions be made a condition to the exemption of governmental property from attachment. The court below, conceding it could find "no New York authority on the point", noted that "a number of authorities in other jurisdictions find quite significant the fact of the completion of a contractor's obligations" (319 F. 2d at 111, *infra* at pp. 48a-49a). With one exception, each of the authorities in other jurisdictions cited as "analogous" (319 F. 2d at 111-112, *infra* at p. 49a) deals with the garnishment of a debt *owing by* a governmental body, and is here inapplicable. In such a garnishment case, under New York law, "the fact of the completion of a contractor's obligation" is not relevant to any question of interference (or lack of it) with governmental function. Such fact is significant only in regard to the question whether there is a matured debt owing to the contractor which his creditor can reach. *Shechy* v. *Madison Square Garden Corp.* (1934) 266 N. Y. 44, 193 N. E. 633.

The single authority cited below as "analogous" which did not deal with such a garnishment is *State* v. *Blake* (1933) 88 Utah 584, 597-598, 20 P. 2d 871, 876-877, modified (1936) 88 Utah 600, 56 P. 2d 1347. At the pages cited in the opinion below, the Utah court—as did this Court in *Larson* (*supra*, pp. 11-12)—considered the policy behind governmental exemption from levy. There is nothing in the Utah court's opinion to suggest that it—any more than this Court in *Larson*—would "examine the necessity in each case" before upholding governmental exemption.

(b) The new formulation is unworkable.

A compelling practical basis for the rule prohibiting judicial examination of "the necessity in each case" in which a governmental exemption is invoked (see *supra*, p. 12) is that judicial procedures are ill suited to such examination. *Cf. East St. Louis* v. *United States ex rel. Zebley* (1884) 110 U. S. 321.

In the case cited, a Circuit Court had directed the city of East St. Louis to appropriate a certain portion of its annual tax revenue to satisfy a judgment against it, the court having determined that such portion was not necessary or required to "defray the necessary current expenses of said city" (110 U. S. at 323). This Court reversed, ruling the propriety and necessity of governmental expenses not to be judicial questions. Thus, the Court, per Mr. Justice MATTHEWS, observed (*id.* at 324):

> "the question, what expenditures are proper and necessary for the municipal administration, is not judicial; it is confided by law to the discretion of the municipal authorities."

The Court pointed out some practical reasons why the judiciary should not become enmeshed in such problems. Thus, Mr. Justice MATTHEWS continued (*id.* at 324-325):

> "No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

The language quoted is apt to the situation at bar. The Court of Appeals now proposes that the District Court undertake a "penetrating and thorough study" to determine the extent to which seizure of these particular funds would interfere with petitioner's public duties (319 F. 2d at 104, *infra* at p. 33a). Among the factors to be considered in this study are (319 F. 2d at 112-113, *infra* at pp. 50a-52a):

> (i) Is the entire hydroelectric project completed or does there remain "relevant work for others"?
>
> (ii) What, if any, claims may be expected from persons besides this plaintiff?
>
> (iii) What would be the effect of preventing the attached funds from "moving to the Reserve Account in the Bond Fund," i.e., will the attachment impair the District's financial standing in any substantial degree?

Although this suggested study would be incidental to a preliminary determination for jurisdictional purposes, resolution of considerations (i) and (ii) would be no less protracted than the trial of the lawsuit on its merits. The project could not be said to have been completed—and there could be no assurance that other contractors would not be necessary to finish the work—unless respondent established that it had erected an adequate dam, and had thus substantially performed its contract.[5]

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5. By repeated use of such expressions as "we are told" and "uncontradicted affidavits before us", the court below revealed its undeclared assumption that respondent was in the position of an established "creditor" which had "totally" completed the work for which it had been employed, and therefore had some sort of equity in the funds that had been raised to finance the project (319 F. 2d at 98, 102, 109, 111, 112, *infra* at pp. 20a, 27a, 43a, 48a, 50a-51a). In fact, respondent's claims of performance are bitterly disputed (see *supra*, p. 5). Respondent's self-serving affidavits are "uncontradicted" only because no question as to the merits of respondent's claim was—or is—presented by petitioner's motion to vacate the attachment.

Consideration (iii) would involve, among other things, determination of proper reserves to be set up against contingencies. Such matters are not suitable for judicial consideration. This conclusion is especially compelling where the judge called upon to make the determination would be one living some three thousand miles away from the project, who would presumably be wholly without background information as to the hydroelectric power systems of the Pacific Northwest.

Moreover, under the court's formulation, it would never be possible for a plaintiff, a defendant or a bank to determine the validity of any substantial attachment in advance of a judicial inquiry. In every case involving attachment of governmental property, the particular asset seized by a plaintiff would—under the new formulation—be immobilized while some court made a factual inquiry of the sort required by the Court of Appeals.

Indeed, a decision as to any particular attachment would shed no light on the validity of a subsequent attachment on the same or similar property. For example, if the instant attachment were vacated after the inquiry directed by the Court of Appeals and a new attachment were attempted a month later, the question then would be whether some court in New York thought enough progress had been made with the construction so that the new (or the same) plaintiff could then seize the funds without "substantial interference" with petitioner's public duties. On the other hand, if the instant attachment should withstand such inquiry and be upheld, the question next time would be

whether a court in New York then thought that respondent's seizure of $17,000,000 had rendered hazardous any further inroads on petitioner's funds.

The New York State courts would not adopt any such cumbersome and unworkable formula for determining jurisdiction over the governmental instrumentalities of sister states—especially in a case such as the one at bar, where the sister state provides forums for suits against its instrumentalities (*e.g.*, Rev. Code Wash. 54.16.110, *infra* at p. 66a).

(c) The new formulation is contrary to New York public policy with respect to suits against governmental instrumentalities.

There are two major facets of New York policy with respect to suits against its own governmental instrumentalities. First, New York has made those instrumentalities answerable for their acts, both in tort and in contract. Second, New York has decreed that suits against governmental instrumentalities may be prosecuted only according to such procedures and in such tribunals as the legislature may designate. N. Y. Court of Claims Act, §8; *Benz* v. *New York State Thruway Auth.* (1961) 9 N. Y. 2d 486, 490 174 N. E. 2d 727, 728, cert. dismissed (1962) 369 U. S. 147; *New York Post Corp.* v. *Moses* (1961) 10 N. Y. 2d 199, 203, 176 N. E. 2d 709, 710; *Brown* v. *Trustees, Hamptonburg School Dist.* (1952) 303 N. Y. 484, 488-489, 104 N. E. 2d 866, 868-869.

With respect to the facet of this public policy concerning the forum in which suits against governmental instrumentalities may be brought, the highest court of New York

has recently declared (*New York Post Corp.* v. *Moses*, *supra*, 10 N. Y. 2d at 203, 176 N. E. 2d at 710):

> "Decisions such as *Benz* v. *New York State Thruway Auth.* (9 NY 2d 486) are expressive of a constitutional and legislative policy that public authorities should be subjected only to those procedures which have been specifically mandated. '[T]here is no jurisdiction in any court of any suit against [an Authority] except as the Legislature has in terms created such jurisdiction' * * *."

In light of such unequivocal statement of its policy with respect to its own public authorities, New York would not impose a different rule upon a public authority of a sister state, and force it to submit to the jurisdiction of a court which had not been designated by the legislature of such state and which is situated some three thousand miles from the seat of the authority's operations.[6]

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[6] Insofar as the question has arisen elsewhere, it has almost without exception been held that the courts of one state will not permit the use of attachment to obtain jurisdiction over governmental instrumentalities of a sister state. *Eastern Union Co.* v. *Moffat Tunnel Improvement Dist.* (1934) 36 Del. 488, 178 Atl. 864; *W. K. Terry & Co.* v. *Hyde County, N. C.* (1929) 33 Ohio App. 118, 168 N. E. 562; *Parks Co.* v. *City of Decatur, Ill.* (6th Cir. 1905) 138 Fed. 550 (Kentucky law); *Board of Directors of St. Francis Levee District* v. *Bodkin Bros.* (1902) 108 Tenn. 700, 69 S. W. 270. *But cf. National Shawmut Bank* v. *City of Waterville* (1934) 285 Mass. 252, 189 N. E. 92. See also *O'Toole* v. *United States* (D. Del. 1952) 106 F. Supp. 804, 809 (unsuccessful attempt, based upon Delaware nonresident motorist statute, to obtain jurisdiction over District of Columbia), modified as to other defendants (3rd Cir. 1953) 206 F. 2d 912. Such decisions are based on the dual concept that it would be offensive to comity between the states to require an instrumentality of one state to subject itself to the judicial process of another, and that great public inconvenience would result from compelling a governmental instrumentality to carry on litigation in a distant forum. Thus, in *Eastern Union Co.* v. *Moffat Tunnel Improvement Dist.*,

To summarize: The "new" doctrine "developed and formulated" by the Court of Appeals is contrary to existing New York law. It is unworkable, and contrary to New York public policy. The New York courts would not adopt such a doctrine were a similar case to come before them. The case should therefore have been disposed of on the District Court's finding—affirmed by the Court of Appeals—that the petitioner had acquired the attached property in the course of governmental activities and was devoting it to public use.

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supra, the Supreme Court of Delaware declared (36 Del. at 505, 178 Atl. at 871):

> "We think that it would be an offense to the principle of comity between the states and productive of mischiefs of a serious and aggravated nature if the practice were to prevail of one state through its courts entertaining suits against agencies created by a sister sovereign to promote and advance its own public welfare, and subjecting those agencies to judgments and such executionary remedies as it might be in the power of the domestic court to enforce."

In *Parks Co.* v. *City of Decatur, Ill., supra*, the Circuit Court of Appeals for the Sixth Circuit observed (138 Fed. at 553):

> "because of the public inconvenience resulting from carrying on a litigation in a distant forum, the rule has become quite generally recognized that such [municipal] corporations cannot be sued elsewhere than in the venue of their location * * *."

II

The precedent established by the Court of Appeals is of far-reaching importance.

Subjoined as Appendix C is a list of seventeen representative bond issues underwritten in New York during recent years for out-of-state governmental instrumentalities. The borrowings referred to on this list alone total almost two billion dollars. Borrowers listed include governmental instrumentalities of seven states and the Commonwealth of Puerto Rico. Public projects financed by these representative borrowings run the gamut of governmental activity, including turnpikes, water systems, sewage systems, and airport facilities. Each of the listed bond issues was underwritten pursuant to an arrangement—similar to the one at bar—whereby a construction fund to assure completion of the project was established in a New York bank.[7] As can be deduced from the affidavit of John B. Dawson, Esq., petitioner's bond counsel (Joint Appendix, p. 88a), it is a practice of underwriters in this type of financing to require the security provided by such a construction fund.

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7. Every such "construction fund" is designed to provide security for bondholders, while leaving the borrower with sufficient flexibility to get ahead with the business of constructing a dam or other project. The question whether a trust valid against attachment can, as a practical matter, be created in such circumstances presents difficulties. Varying circumstances with respect to each borrowing result in differences in the documents used to deal with these difficulties. As indicated by the District Court in the instant case, where attachment of governmental property is attempted, application of New York law as to the nonattachability of such property makes it unnecessary to pass upon the effect of any particular trust instrument (207 F. Supp. at 447-448, *infra* at p. 12a; *cf.* 319 F. 2d at 104, *infra* at p. 33a).

The decision below, which affects the integrity of every such construction fund and any other New York deposits of sister state instrumentalities, jeopardizes every governmental instrumentality that may have sold such bonds in the immediate past, and complicates the problem of any such instrumentality that may in the future contemplate recourse to the New York market or that may have other needs for keeping funds in New York.

This consideration has become the more compelling with the taking effect on July 1, 1963 of the new amendment to Rule 4(e) of the Federal Rules of Civil Procedure (*cf.* 319 F. 2d at 102, *infra* at pp. 28a-29a). That amendment, giving attachment plaintiffs in diversity cases direct access to the federal courts, makes it unlikely that the New York courts will have an opportunity to reestablish the correct New York rule. With the newly formulated doctrine available in the federal courts, no attachment plaintiff with a substantial claim is likely to venture into a state court with its—for him—less favorable doctrine.

Conclusion

The incorrect statement of New York law newly developed and formulated by the Court of Appeals—which will result in an unwarranted extension of the jurisdiction of federal courts sitting in New York—should not be permitted to stand. Courts situated in the State of Washington are open to respondent's suit against petitioner. Petitioner should not be compelled to come to New York—three thousand miles from the seat of its activities—to defend an action involving its governmental functions. Nor should petitioner be required to establish before a court in New York its need for the $17,000,000 in governmental funds respondent has attached.

Prayer for Relief

Your petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit; and that, upon such review, the judgment of the Court of Appeals be reversed with directions that the order of the District Court be reinstated.

Respectfully submitted,

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NAT W. WASHINGTON
MARTIN F. RICHMAN
EDMUND R. SCHROEDER
LEONARD SIMS
PAUL R. HERMAN
Of Counsel

October 31, 1963

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MERRITT-CHAPMAN & SCOTT CORPORATION

Plaintiff

against

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON

Defendant

Cleary, Gottlieb & Steen, New York City, for plaintiff, William L. Lynch, James W. Lamberton, Dennis J. Kenny, New York City, of counsel.

Root, Barrett, Cohen, Knapp & Smith, New York City, for defendant appearing specially, Washington & Wickwire, Ephrata, Wash., Whitman Knapp, New York City, Nat W. Washington, Ephrata, Wash., Neal J. Hurwitz, Edmund R. Schroeder, New York City, of counsel.

NOONAN, District Judge.

This is a motion by defendant, Public Utility District No. 2 of Grant County, Washington, made pursuant to Rule 12(b), Federal Rules of Civil Procedure, 28 U. S.

Appendix A

C. A. Defendant, appearing specially,[1] moves the court for an order:

1) vacating a warrant of attachment and setting aside the levy thereunder upon the Bankers Trust Company and

2) setting aside the service of summons on the ground that the property and credits alleged to have been attached were not subject to attachment and, in any event, were not the property of or credits of defendant.

Public Utility District #2 of Grant County, Washington, was established by vote in 1938 and has its headquarters at Ephrata, Washington. Since January 1942, the District has owned and operated an electric distribution system serving all of the populated areas of the County. This system is referred to as the Distribution System. The financing operation and ownership of the Distribution System was consolidated under Resolution No. 75 of the District which provides among other things that the District may incur indebtedness to finance the acquisition or construction of additional generating transmission and distribution facilities. "As permitted, * * * the District has established the Production System for the purpose of financing the construction of the Priest Rapids Development by the issuance of the Bonds, the funds, properties, operations and business of which shall be accounted for separately from those of the Distribution System. The Production System is not a separate legal entity but is in the nature of an operating division of the District under the control of the Commission", which administers the District. (Official Statement, page 2).

1. See Rule 12, Federal Rules of Civil Procedure Commentaries Sec. 4 on the subject of special appearances.

Appendix A

In 1954, Congress granted the District the right to develop the Priest Rapids Hydro-Electric Project on the Columbia River under a license issued pursuant to the Federal Power Act. On November 4, 1955 and June 1, 1956, the Federal Power Commission granted the District a license permitting the District to develop, construct, operate and maintain as a single project the Priest Rapids Hydro-Electric Project consisting of (1) the Priest Rapids Development, and (2) the Wanapum Development at a site approximately 18 miles upstream from the Priest Rapids Development site.

In order to finance the development, revenue bonds were authorized in the amount of $166,000,000. These funds so acquired were then placed in various funds to wit, the Bond Fund, Revenue Fund, Renewal Fund, Replacement Fund, Construction Fund and Construction Interest Fund. The subject of this motion concerns only the last two funds on deposit in Bankers Trust Company in New York, which have been attached.

Prior to entering into any contract for construction of the Priest Rapids Development, the District and twelve public and private electric utilities (the "Purchasers") entered into power sales contracts. Under these contracts, which will not expire until October 31, 2005, the Purchasers will buy 63.5% of the output of the Production System; the District has reserved 36.5% of the power output for its own Distribution System and for sale to others.

The twelve purchasers operate private and public electric utility systems in the states of Washington, Oregon, Idaho, Montana and Wyoming. Taus approximately ⅔ of the output of the Production System was sold by the District for a term of 40 years. The power reserved by the

District for itself and for sale to others was estimated in 1956 to amount to 230,242 kw. In 1955, the District's own Distribution System had a maximum demand for 63,006 kw.

On July 9, 1956 pursuant to competitive bid and award, Merritt-Chapman & Scott Corporation, plaintiff herein, a Delaware corporation with its principal offices in New York, New York, entered into a contract with the defendant District for the construction of the Priest Rapids Dam. A construction period was established that would result in completion of the Production System by October 1961.

On September 28, 1961, the District's construction engineers certified to the District that construction of the dam by Merritt-Chapman & Scott Corporation was completed. When the District refused to pay over the funds claimed by Merritt-Chapman & Scott Corporation to be due upon completion of construction, Merritt-Chapman & Scott Corporation commenced suit against the District in the New York Supreme Court.

On March 7, 1962, the New York Supreme Court issued a warrant of attachment against funds of the District in New York, and a levy was made thereunder on funds on Deposit with Bankers Trust Company, New York, New York. Subsequently, the summons and verified complaint were duly served upon the District, and on March 26, 1962, this cause was removed to this Court by the District.

It is the position of the defendant that:

a) Public Utility District #2 is a political subdivision of the State of Washington, is "engaged in the performance of essential functions," and, therefore, its property is immune from attachment.

b) Public Utility District #2 further maintains that its funds now on deposit with Bankers Trust Company are trust funds and therefore not property subject to attachment.

The court will address itself to the first of the two arguments set forth by the defendant. There seems to be little doubt concerning governmental status of Public Utility District #2. The basic enabling legislation enacted in 1931 by the people of the State of Washington established the District as a political subdivision and municipal corporation of the State. In Public Utility District No. 2 of Grant County v. Washington State Power Commission, 46 Wash. 2d 233, 280 P. 2d 264 (1955), the Supreme Court of the State of Washington declared Public Utility District #2 to be a "political subdivision of the state."

Public Utility Districts in Washington have been empowered to levy and collect taxes within their respective geographical limits. The districts are to be governed by commissioners elected by the people at general elections. All of the above clearly point to the fact that Public Utility District #2 was and is to be considered a political subdivision of the State.

Whether or not the property of a municipal corporation is subject to foreign attachment appears to depend upon whether such property is derived from a proprietary function engaged in by the municipal corporation. The law is clear in New York that funds of a municipal corporation collected through ordinary governmental means for local purposes cannot be the subject of attachment. Thus in Van Horn v. Kittitas County, Wash., 28 Misc. 333,

Appendix A

59 N. Y. S. 883 (Sup. Ct. N. Y. Co. 1899), aff'd 46 App. Div. 623, 61 N. Y. S. 1150, the court in vacating the levy of attachment stated:

> "It appears that the treasurer of the defendant (Kittitas County), in the performance of his duties remitted to the Chemical Bank, in the city of New York, a sum of money for the payment of coupons, representing interest about to fall due on certain bonds which had been issued by the defendant, and which, by the terms of the coupons, was payable at that bank. This money had been raised by taxation, and had been appropriated for the payment of interest in question. It is true that there was nothing in the arrangement between the defendant and the bank which constituted the latter a trustee for the holders of the coupons, so as to give such holders an interest in the fund which could be enforced against the bank * * *. The bank was the mere agent of the defendant or of its treasurer, and the money was subject to recall at any time before it was applied to the purposes for which it had been remitted so that it continued to be the exclusive property of the defendant. It was not, however, the property of the county, in any private or proprietary sense, but was acquired by it for a public purpose, in the exercise of its political powers, and was appropriated for a specific purpose, inconsistent with its use for the discharge of the plaintiff's claim. * * * It is well settled that property thus acquired, held, and appropriated by a public corporation is not subject to levy. In support of this proposition it is sufficient to cite 1 Dill. Mun. Corp. §100, where the learned author says:

Appendix A

> "'The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work.' Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its creation thwarted. Based upon considerations of this character, it is the settled doctrine of the law that not only the public property, but also the taxes and public revenues of such corporations, cannot be seized under execution against them, either in the treasury, or when in transit to it. * * * The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect.'"

Where, however, it has been shown that property of a municipal corporation has been acquired through a proprietary venture; the courts in New York have allowed a levy of attachment on such property. In Harman v. City of Ft. Lauderdale, 134 Misc. 133, 234 N. Y. S. 196 at p. 198 (Sup. Ct. N. Y. Co. 1929), the court stated:

> "This levy under this valid attachment should be upheld, for the reason that the property and property rights so levied upon are, in my opinion, clearly property of the Broward County Port Authority, which it holds in a private and proprietary capacity, as distinguished from a governmental and political capacity. * * * In my opinion such functions are private and proprietary, and the operation, control, and management of a harbor district improvement within the powers here conferred upon this Port Authority essentially are not governmental or political functions, but

> are in the nature of a private business enterprise engaged in with the hope of revenue. The courts in this state have frequently recognized the distinction between those activities of a municipal corporation which are governmental in character and those which are commercial."

Likewise in Doyle v. City of Astoria, Oregon, 147 Misc. 127, 262 N. Y. S. 572 (Sup. Ct. N. Y. Co. 1932), aff'd 238 App. Div. 833, 262 N. Y. S. 973, the Court allowed the funds of a municipal corporation raised through a proprietary venture to be attached

We come now to what this court considers the central point on the motion, that is, whether the activities of Public Utility District #2 constitute local governmental duties or whether such a venture is private and proprietary in nature with the resulting consequence that any funds derived from the activity may be considered proper subject matter for attachment.

As the Supreme Court said in Brush v. Commissioner, 300 U. S. 352, at p. 365, 57 S. Ct. 495, at p. 498, 81 L. Ed. 691:

> "We thus come to a situation, which the courts have frequently been called upon to meet, where the issue cannot be decided in accordance with an established formula, but where points along the line 'are fixed by decisions that this or that concrete case falls on the nearer or farther side.' Hudson [County] Water Co. v. McCarter, 209 U. S. 349, 355 [28 S. Ct. 529, 531, 52 L. Ed. 828]. We are, of course, quite able to say that certain functions exercised by a city are clearly gov-

ernmental—that is, lie upon the nearer side of the line —while others are just as clearly private or corporate in character, and lie upon the farther side. But between these two opposite classes, there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.' Continental [Illinois] Bank [& Trust Co.] v. Chicago, R. I. & P. Ry. [Co.], 294 U. S. 648, 670 [55 S. Ct. 595, 603, 79 L. Ed. 1110], and cases cited."

When Public Law 544, 83d Congress Chapter 589— 2d Session H. R. 7664, 68 Stat. 573 was passed by Congress permitting the development of Priest Rapids Dam, it was foreseen that such a project would provide navigation locks and effective flood control for that area in which it was to be built. Such projects are certainly governmental in nature. The fact that the navigational locks, as yet have not been installed seems to be an engineering problem and not cause for suggesting that their installation will never be effected.

It would seem that the principal basis for plaintiff's position that Public Utility District #2 is acting in a private and proprietary manner stems from the executed Purchaser's Contracts; (noted above), and the resulting funds acquired therefrom.

The presence of a governmental agency in the field of producing electricity is not a novel approach to fulfilling this public need. In New York State we have the Power Authority of the State of New York created,

Appendix A

> "In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state * * *." §1001 of the Public Authorities Law of New York (McKinney's Consol. Laws, c. 43-A, Vol. 42, Part 1).

The Court can see no prejudice to the Public Utility District #2 position as a governmental agency operating an essential governmental function from the fact that it has entered into various contracts to sell the power developed by the Production System. Public Law 544, Sec. 6, provides:

> "such license shall provide that the licensee shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighborhood States * * *."

The percentages of power to be so appropriated were carefully determined by engineers, based on the productivity of the development. With respect to the funds received for such allotments it is the opinion of this court that they do not represent profits from a venture, under the law as found in Harman v. City of Ft. Lauderdale, supra. The contracts in question provide that the Purchasers each year agree to pay the cost of the power allocated to it.

These contracts provide that before the beginning of each contract year the District shall estimate the cost of production: that each "Purchaser" shall pay its share of such estimated cost in equal monthly installments through-

out the year; that after the end of each year an audit shall be made to determine the year's actual costs; and that, upon submission of each audit, each "Purchaser" shall either make up any deficiency resulting from an inadequate estimate or receive a credit for any balance that may have resulted from an excessive estimate. The cost of production includes, of course, the establishment and maintenance of adequate reserves and working capital.

At the expiration of the fifty year contract term, all such "working capital and all reserves" will be distributed pro rata among the Purchasers.

On the subject of profits the court is reminded of what the Supreme Court stated in Brush v. Commissioner, supra, 300 U. S. at p. 372, 57 S. Ct. at p. 501:

> "Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character. We first pause to observe that the overhead due to the enormous cost of the system, and the fact that so large a proportion of the water is diverted for public use, rather plainly suggests that no real profit is likely to result. And to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized."

Appendix A

After a careful consideration of the various other points raised on this motion, it is the opinion of this court that Public Utility District #2 is a municipal corporation not engaged in a private and proprietary venture. As such the monies, held by the Bankers Trust Company, in two funds, are not subject to attachment. The court, in the light of this conclusion, finds it unnecessary to determine the trust status of these funds.

Levy of attachment is hereby vacated, and service of the summons set aside.

So ordered.

Appendix A

Original opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 164—October Term, 1962

(Argued December 10, 1962 Decided April 22, 1963)

Docket No. 27783

MERRITT-CHAPMAN & SCOTT CORPORATION,
Plaintiff-Appellant,

against

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Defendant-Appellee.

Before:

MEDINA, WATERMAN and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Gregory F. Noonan, Judge.

Plaintiff, Merritt-Chapman & Scott Corporation, appeals from an order setting aside an out-of-state service of summons, and vacating a warrant of attachment and a levy thereunder upon funds on deposit with Bankers Trust Company, of New York City, for the account of defendant,

Appendix A

Public Utility District No. 2 of Grant County, Washington. Opinion below reported at 207 F. Supp. 443. Reversed and remanded.

William L. Lynch, New York City (James W. Lamberton, Dennis J. Kenny and Cleary, Gottlieb, Steen & Hamilton, New York City, on the brief), for plaintiff-appellant.

Whitman Knapp, New York City (Nat W. Washington, Ephrata, Wash., Edmund R. Schroeder, Neal J. Hurwitz and Root, Barrett, Cohen, Knapp & Smith, Leonard Sims, Paul R. Herman, New York City, and Washington & Wickwire, Ephrata, Wash., on the brief), for defendant-appellee.

Orison S. Marden, A. Hayne deYampert and White & Case, New York City, for Bankers Trust Co., as amicus curiae.

Louis J. Lefkowitz, Atty. Gen. of New York, Samuel A. Hirshowitz, First Asst. Atty. Gen., and Sheldon Raab, Deputy Asst. Atty. Gen., New York City, amicus curiae.

MEDINA, *Circuit Judge*:

This is an action to enforce a New York contract dated July 9, 1956 between plaintiff-appellant, Merritt-Chapman & Scott Corporation, a Delaware contractor with principal offices in New York City, and defendant-appellee, Public Utility District No. 2 of Grant County, Washington, a municipal corporation formed under the laws of the State of Washington. On March 7, 1962 a warrant of attachment

was issued by the New York Supreme Court, New York County, and a levy made upon certain funds on deposit with Bankers Trust Company, in New York City, for the account of the District. Service of the summons and verified complaint was subsequently made upon the District at Coulee City, Washington. On March 26, 1962 the District removed the action to the United States District Court for the Southern District of New York on grounds of diversity of citizenship, and prior to answer moved to vacate the warrant of attachment and the levy thereunder and to set aside the service of summons on the ground that the funds on deposit with the Bank are immune from attachment levy under the doctrine of governmental immunity, or, alternatively, are trust funds and therefore not property subject to attachment. As there is no *in personam* jurisdiction, the out-of-state service of summons must be set aside and the case dismissed if the levy is unauthorized and illegal. Judge Noonan vacated the levy and set aside the service of summons because he found the activities of the District to be "governmental" and not "proprietary," and accordingly held the District entitled to immunity. He did not pass upon or discuss the trust fund theory. The opinion below is reported at 207 F. Supp. 443.

I

The Facts

Defendant-appellee, Public Utility District No. 2 of Grant County, Washington, was established in 1938 pursuant to a general statute providing for the creation of "public utility districts," enacted in 1931 by the people of the State at a general election pursuant to an initiative

petition. Revised Code of Washington, Title 54.04.020. Its headquarters are at Ephrata, Washington, and it is co-extensive with Grant County, Washington, which had a population of 39,300 persons in 1955. The District is governed by five Commissioners elected by the people of Grant County at general elections. The District can sue and be sued under Washington law, but its property is not subject to execution, the method of enforcement of judgment being by request or mandamus to the proper District officer. Revised Code of Washington, Titles 54.16.110, 6.04.140, 6.04.150. The District is empowered for all corporate purposes, including the construction of facilities to provide its inhabitants and others with electric power and navigation and other water services, both to issue revenue bonds and to levy and collect general taxes on property within its geographical limits regardless of whether the property owner is served directly by the District. Revised Code of Washington, Titles 54.16.030-54.16.080, 54.24.018.

The purpose of Washington public utility districts, which the Washington courts have declared to be "political subdivision[s] of the state" (*Public Utility District No. 2 of Grant County* v. *Washington State Power Commission*, 1955, 46 Wash. 2d 233, 234, 280 P. 2d 264, 265), is to "conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses." Laws 1931, c. 1, §1; Revised Code of Washington, Title 54.04.020. Since January, 1942 the District has owned and operated an electrical distribution system serving in 1956 more than 13,000 customers located within Grant County. On August 2, 1945 the District adopted Resolution No. 75 which provides that the District, pur-

suant to the authority of the basic enabling statute, may incur indebtedness to finance the acquisition or construction of additional generating, transmission and distribution facilities to meet the growing power needs of Grant County and the State of Washington. These additional facilities were to constitute an operating division of the District, but under separate accounting procedures and revenues from the facilities might be pledged to the retirement of the indebtedness. Thereafter, the District became interested in the development of a hydro-electric project at the Priest Rapids site on the Columbia River, and its financial and other activities in relation thereto and the contract which it entered into with Merritt-Chapman & Scott Corporation, constitute the subject matter giving rise to this litigation.

The development of the Columbia River for comprehensive purposes of public benefit, including electric power production, navigation and flood control, was long a matter of concern by both the federal and Washington State governments. Thus in 1925 a full report was prepared by the United States Army Corps of Engineers. House Document No. 308, 69th Cong., 1st Sess. Section 204 of the Flood Control Act of 1950 (Public Laws 516, 64 Stat. 170, Laws of the 81st Cong., 2d Sess., c. 188) lists the "Priest Rapids Dam, Columbia River, Washington" as one of the "works of improvement for the benefit of navigation and the control of destructive flood waters" authorized to be prosecuted under the direction and supervision of the Secretary of the Army and the Corps of Engineers. In 1952 the District applied to the Federal Power Commission for a permit to investigate this site, and in 1954 Congress enacted Public Law 544 (Laws of 83rd Cong., 2d Sess., c. 589), Section 1 of which modified the 1950 Act to permit the District

specifically, or "any division, subdivision, agency or commission of the State of Washington" to proceed with the project under terms and conditions of a license to be procured from the Federal Power Commission. Section 2 specified that the site shall be developed "as a part of the comprehensive plan for economically feasible control and utilization of the water resources for flood control, navigation, power, and other beneficial purposes." Section 4 provided that navigation locks and flood control features should be provided at federal expense. Section 5 provided that, at the request of the District, the Corps of Engineers would acquire "lands, easements, rights-of-way or other interest in land in accordance with federal laws and procedures governing flood-control projects and subsequent conveyance thereof to the licensee." The District's affidavits state that "in point of fact, the Corps of Engineers has acted and is still acting as the land acquisition agency for the defendant District." Section 6 provided that the licensee "shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighboring States." A requirement that preference be given to governmental agencies and cooperatives was eliminated from the Act as unnecessary "upon the premise that public bodies organized as nonprofit agencies to perform a public purpose could be entrusted with the responsibility of conducting their operations in the best public interest." Senate Report No. 1656 to accompany H. R. 7664, page 4, 83rd Cong., 2d Sess. (1954).

In 1955, the Federal Power Commission granted the District a fifty-year license permitting it to develop the Priest Rapids site through the construction of two projects: the Priest Rapids Development and the Wanapum Develop-

ment at a site 18 miles upstream from the Priest Rapids Development. The license authorized the District to build and operate the Priest Rapids Development and the upstream Wanapum Development as a multipurpose project, integrated with the Columbia River Basin comprehensive plan, and to serve functions of power generation, flood control, navigation and migratory fish passage. Specific requirements in the license for the non-power functions include: adequate provisions for passage of upstream fish migrations; provisions to facilitate future installation of navigation locks; provisions for flood control storage by drawing the reservoirs down below normal operating levels, with compensation to the District by the federal government for reduced power output as a consequence of lowered reservoir levels. The District was required by the license to begin construction of the Priest Rapids Development by July 1, 1956 and to complete construction by September 12, 1961, subsequently extended to July 1, 1958 and September 12, 1963 respectively. This litigation concerns only the Priest Rapids Development although it may be noted in passing that the District has issued $195,000,000 of revenue bonds for the Wanapum project.

Early in 1956 the District advertised for sealed bids on the Priest Rapids Project and subsequently entered into a contract with the Contractor as low bidder at $91.9 million (estimated in 1956 as 94% or 96% of the cost of construction work, equipment, supplies and installation) dated July 9, 1956 in New York City, to perform labor and services and furnish materials for construction of the dam, power plant and appurtenances for the Priest Rapids Project on the Columbia River in accordance with plans furnished by the Harza Engineering Company of Chicago. The contract established a construction period of 1968

days, with the expectation that work would commence shortly upon execution, and with bonus and penalty provisions for variations from the construction period. A 50% performance bond was posted by the Contractor. Agreements supplementing the contract were entered into by the parties subsequently, and on September 28, 1961 the District's Construction Engineer certified to it that the Contractor had completed its work under the contract. The uncontradicted affidavits before us state that ten generating units, the full requirement under the contract, are now in commercial operation by the District. The navigation locks and other non-power features of the Priest Rapids Project have apparently not yet been undertaken.

Prior to entering into the construction contract, the District negotiated identical power sales contracts with eight public and four private utilities serving the States of Washington, Oregon, Idaho, Montana and Wyoming, whereunder the District agreed to sell and the utilities to purchase at cost 63.5% of the Priest Rapids Development output during the term of the District's license, with 36.5% being reserved to the District for its own use, or for sale to others, this balance constituting more than enough to fulfill the expected power needs of Grant County during the term of the license. As the court below found, the percentages of power allocated to the respective purchasers were "carefully determined by engineers, based on the productivity of the development," in attempted compliance with the requirement of Public Law 544 that a "reasonable portion of the power output of the project" be offered for sale "within the economic market area in neighboring States." Upon approval of the plan by the Federal Power Commission, the contracts were executed and placed in escrow pending completion of financial arrangements by the District.

Appendix A

Under the power sales contracts, power is to be delivered by the District at the dam itself, located within Grant County, or, at the option of the purchaser, at the Midway Substation of the United States Government's Bonneville Power Administration in Washington, seven miles from the dam but outside the confines of Grant County. At present, power is being delivered at the Midway Substation.

The contracts also provide that "in order that the Purchasers may, in an orderly way, participate in problems relating to the Priest Rapids Development," a Purchaser's Advisory Committee is created to meet monthly with the District to discuss and make recommendations with reference to the project. Written recommendations must be rejected in writing with reasons given, and two-thirds of the Committee may compel the District to submit to arbitration various matters relating to the operation and financing of the project "except such matters which are by law vested exclusively in the discretion of the District." The parties have agreed to be bound by arbitration "insofar as the parties hereto may legally do so." It is also provided that the remainder of the contract provisions are severable from the arbitration provisions should these be found to be contrary to law.

While the District may have "earnings" or "revenue" from the operation of the Priest Rapids Production System, this is solely in the accounting sense that income exceeds expenses, and all such revenues must be applied either to retire indebtedness, to establish working capital and reserves for expansion and contingencies, or to reduce or stabilize rates.

In order to finance the Priest Rapids Project, the District sought to issue revenue bonds, and negotiations were

entered into between the District and underwriters headed by Halsey, Stuart & Co. Inc. representing prospective bondholders. As a result of these negotiations, agreements were reached, embodied in District Resolution No. 313, dated June 19, 1956, the Bond Resolution, providing for the issuance of $166,000,000 face value revenue bonds, with direct payment to the District of $1,250,000 as reimbursement for costs and expenses of preliminary investigations and reports and $3,000,000 in working capital. The underwriters, however, would not subscribe for the issue unless special arrangements were devised for the protection of the bondholders. On the other hand, the District sought to comply with the Washington statute which provided that "the treasurer of the county in which the utility district is located shall be ex officio treasurer of the district and all district funds shall be paid to him * * *." Enacted Laws 1955 ch. 124 § 7, p. 549, predecessor of Revised Code of Washington, Title 54.24.010. As a result of negotiations entered into to harmonize these conflicting purposes, the following financial arrangements were arrived at and ultimately accepted and are embodied in the Bond Resolution.

Five separate funds were created: (a) Construction Fund; (b) Construction Interest Fund; (c) Revenue Fund; (d) Bond Fund; and (e) Renewal and Replacement Fund. Chemical Corn Exchange Bank of New York City was designated and signified its acceptance as "Bond Fund Trustee." Bankers Trust Company of New York City was designated and signified its acceptance as "Construction Fund Trustee." At the date of closing, July 9, 1956, the purchasers delivered a check in the amount of $149,009,500 to the order of "Bankers Trust Company, Con-

struction Fund Trustee," with instructions to deposit $33,484,379 to the Construction Interest Fund and $115,525,121 to the Construction Fund. The transfers were so made, and the books of Bankers Trust Company identified the funds as follows:

> "Bankers Trust Company Construction Fund Trustee Public Utility District No. 2 Grant County, Washington—Construction Fund Account".
>
> "Bankers Trust Company Construction Fund Trustee Public Utility District No. 2 Grant County, Washington—Construction Interest Fund Account".

It was provided that the Construction Fund Trustee could be removed without cause by 60% of the bondholders, and for cause by the District. (Section 11.)

The Construction Interest Fund was to be used "for the payment of interest on the Bonds during the period of construction of the Production System." The Construction Fund Trustee was to transfer funds to the Bond Fund Trustee who would make these payments directly. (Section 13.)

The Construction Fund was to be used for "payment of the cost of acquisition and construction of the Production System," with a number of illustrative items specified.[1]

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1 "A. Obligations incurred for labor and materials and to contractors, builders and to materialmen in connection with the construction of the Production System for machinery and equipment, excavations, cofferdams, fill, and for the restoration or relocation of property damaged or destroyed in connection with such construction;

B. The cost of acquiring by purchase, if such purchase shall be deemed expedient, and the amount of any award or final judgment in or any settlement or compromise of any proceeding to acquire by condemnation or by the exercise of the power of eminent domain, such lands, property, rights, rights-of-way, franchises, easements or other interests in land as may be deemed necessary or convenient by

Appendix A

Bankers Trust Company could make payment from the Construction Fund only upon the written order of the District, signed by two officers thereof, with a certificate from the Construction Engineer employed by the District that the order represented an obligation properly incurred by the District. The Construction Engineer was required to be the Harza Engineering Company or some other firm "of national reputation, recognized for knowledge, skill and experience in the construction and operation of hydro-electric generating facilities," and the Construction Engineer could not serve as Consulting Engineer or in any

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the District for the construction and operation of the Production System, options and partial payments thereon, and the amount of any damages incident to or consequent upon the construction and operation of the Production System;

C. Interest on the Bonds not otherwise provided for accruing prior to the commencement of and during the Period of Construction;

D. The fees and expenses of the Construction Fund Trustee, the Bond Fund Trustee and of the Paying Agents for all services rendered under this resolution during the Period of Construction, and taxes or other municipal or governmental charges lawfully levied or assessed against the Production System or payments in lieu thereof, during the Period of Construction or any property acquired therefor and premiums on insurance in connection with the Production System during the Period of Construction;

E. The cost to the District of the performance of the duties of the Construction Engineer (appointed as hereinafter provided) with reference to the acquisition and construction of the Production System or the issuance of Bonds therefor;

F. Expenses of the District, salaries of the Commissioners of the District, legal expense and fees, cost of printing and of preparing and issuing the Bonds, wages of office and clerical employees, administrative management expenses, pension requirements, health and hospitalization insurance and all other items of expense not elsewhere in this section specified incident and properly allocable to the acquisition and construction of the Productions System and placing the same in operation (including the premiums on any insurance and fidelity bonds required or obtained during construction), including miscellaneous fees in connection with the acquisition of lands, rights-of-way, property, rights, franchises, easements, cost of abstracts of title, title insurance, cost of surveys and appraisals." (Section 14.)

other capacity. "Upon completion of acquisition and construction and after tests of equipment and facilities in accordance with standard practices," the Construction Engineer was to certify to the District and to the Construction Fund Trustee conformity of the Production System with final plans and readiness for normal and satisfactory operation. (Sections 15 and 16.)

The parties also agreed to the following (Section 17):

> "After the Construction Engineer has filed the certificate of completion of the Production System and after the District has accepted said Production System as completed and ready for continuous operation, and after all costs of acquisition and construction have been paid or, as to any costs not actually paid, the monies for the payment thereof have been set aside by the Construction Fund Trustee for that purpose, such balance of the monies then remaining in the Construction Fund and in the Construction Interest Fund shall be used by the Construction Fund Trustee as follows:
>
> A. Transfer any monies remaining in the Construction Interest Fund to the Construction Fund;
>
> B. Pay to the construction contractor from the Construction Fund, pursuant to the order of the District, any amount due under the construction contract by reason of having completed the Production System in advance of the completion date specified in said contract; and
>
> C. Transfer any monies remaining from such balance in the Construction Fund to the Bond Fund Trustee for credit to the Reserve Account in the Bond Fund."

Appendix A

The District agreed to pay revenues derived by it from ownership and operation of the Production System into a "Revenue Fund" and stated that "all of such monies shall be trust funds in the hands of the District" and should be used solely for the purpose of operating and maintaining the Production System and for making repairs, renewals, replacements, additions, extensions and betterments, and for the purpose of paying principal, interest, and premium, if any, on the bonds. (Section 19.)

A "Bond Fund" was also created to be held by the Bond Fund Trustee "solely for the purpose of paying the principal of and premium, if any, and interest on the bonds * * * and of retiring such Bonds prior to maturity in the manner herein provided." The source of such fund was to be revenues of the Production System, which were to be channeled into a number of accounts in the Bond Fund itself, including the "Reserve Account," into which $6,432,500 was originally paid, to be maintained at this level to make up any deficiency in the Interest Account of the Bond Fund. (Section 20.)

The "Renewal and Replacement Fund" was set up to be maintained at a level of $6,000,000 to make up deficiencies in the Bond Fund, or to pay for renewals, replacements, improvements and extensions or extraordinary operating and maintenance expenses of the Production System. The source of this fund was to be revenues in excess of those necessary to be paid into the Revenue Fund and the Reserve Account in the Bond Fund. (Section 22.)

The parties also agreed to the following terms:

> "The moneys in the Construction Fund and in the Construction Interest Fund, pending their application as provided in this resolution, shall be subject

to a prior and paramount lien and charge in favor of the holders of the Bonds issued and outstanding under this resolution and for the further security of the Bonds until paid out or transferred as herein provided." (Section 12.)

• • •

"The Bonds and the interest thereon shall be a valid claim of the holder thereof only against the Bond Fund and the amount of the revenues of the Production System of the District pledged to the Bond Fund, and shall constitute a prior charge over all other charges or claims whatsoever against the Bond Fund, and the Commission hereby finds and determines that in creating the Bond Fund due regard has been given to the cost of the operation and maintenance of the Production System, and that it has not obligated the District to set aside into the Bond Fund a greater amount of the revenues and proceeds of the Production System than in its judgment will be available over and above such cost of maintenance and operation." (Section 21.)

Upon approval of these arrangements by the Attorney General of the State of Washington the agreement was executed and the above-described payment by the bondholders and deposit into the Construction and Construction Interest Funds were made. On September 28, 1961 the Construction Engineer certified that the Contractor had completed its work on the Project, and the uncontradicted affidavits before us state, as we have already observed, that ten generating units, the full requirement under the contract, are now in commercial operation by the District.

The District, however, has refused to make certain payments claimed due and owing by the Contractor in the amount of $17,391,012 on the ground of fraud and other illegality in securing the contract, and for other reasons also not relevant to our task on this appeal; and the Contractor sought, on March 7, 1962, under the warrant of attachment to levy upon $18,891,051.31 in cash and securities still remaining in the Construction Fund, and $4,799,152.10 still remaining in the Construction Interest Fund.

Stating that "the central point" on the motion to vacate the attachment and levy and set aside the service of summons was "whether the activities of Public Utility District #2 constitute local governmental duties or whether such a venture is private and proprietary in nature," Judge Noonan vacated the attachment and levy and set aside the out-of-state service of summons, upon the finding that "Public Utility District #2 is a municipal corporation not engaged in a private and proprietary venture," and that "as such the monies, held by the Bankers Trust Company, in two funds, are not subject to attachment."

II

The Law

A

Preliminary

The Supreme Court's adoption on January 21, 1963, effective July 1, 1963, of an amendment to Rule 4(e) of the Federal Rules of Civil Procedure under which the federal district courts will be permitted to exercise an original *quasi-in-rem* jurisdiction has no effect on the pro-

cedure in the instant case under which initial steps were taken in the state court and the action removed to the federal court where, as in an ordinary diversity action, state law will be applied to determine the validity of the warrant of attachment and of the levy. 7 Moore, *Federal Practice*, Section 64.07 (2d ed. 1955); 3 Barron & Holtzoff, *Federal Practice & Procedure*, Section 1421 (1958 ed.); *Glaser* v. *North American Uranium & Oil Corp.*, 2 Cir., 1955, 222 F. 2d 552, 554. Since the issue of the validity of the warrant of attachment and of the levy in the instant case is a constitutionally procedural matter for New York conflict of law purposes (*Morris Plan Industrial Bank* v. *Gunning*, 1946, 295 N. Y. 324, 331-332, 67 N. E. 2d 510, 513; *Clark* v. *Williard*, 1935, 294 U. S. 211, 213), the first question for our consideration is the existence and nature of the limitation the New York courts would read into the attachment provisions of the New York Civil Practice Act, Sections 902, 903 and 912, based upon the District's claim of governmental immunity.[2] It is elementary that in deciding this question we do not consider the merits of the Contractor's claim nor of the defenses of the District, neither of which are invalid on their face. *Auerbach* v. *Grand National Pictures, Ltd.*, 176 Misc. 1031, 1033, 29 N. Y. S. 2d 747, 750 (Sup. Ct. 1941), affirmed, 263 App. Div. 712, 31 N. Y. S. 2d 670 (1st Dep't 1941), modified, 263 App. Div. 810, 32 N. Y. S. 2d 128, motion for leave to appeal denied, 263 App. Div. 807, 32 N. Y. S. 2d 129.

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2 The fact that the District possesses the capacity to sue and be sued under Washington law, and the other provisions of Washington law respecting the capacities of the District, are therefore not strictly controlling, although such might prove of interest to the New York courts in formulating the rule of New York law that is to govern this case.

Appendix A

Only three decisions by lower New York courts, two of which were affirmed by the Appellate Division on memorandum, have dealt specifically with this question. There is one additional federal district court case where an attempt is made to apply the New York law. *Van Horn* v. *Kittitas County, Wash.*, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. 1899), aff'd mem., 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dep't 1899); *Harman* v. *City of Fort Lauderdale*, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. 1929); *Doyle* v. *City of Astoria, Ore.*, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. 1932), aff'd mem., 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dep't 1933); *Murdoch* v. *City of Asbury Park*, S. D. N. Y., 1942, 48 F. Supp. 18. We think it will be clear from the discussion in a later part of this opinion that these early cases, for a variety of reasons, cannot form a reliable basis for the formulation of the policy of the State of New York that governs the decision of this case. Therefore, mindful of our duty to use "all the available data" in implementing the rule of *Erie R. Co.* v. *Tompkins*, 1938, 304 U. S. 64, we have resorted to the customary judicial process to determine and apply the state law in the case before us. *West* v. *American Tel. & Tel. Co.*, 1940, 311 U. S. 223, 236-237; *Bernhardt* v. *Polygraphic Co.*, 1955, 350 U. S. 198, 204-205; *Allen* v. *Cohen*, 2 Cir., 1962, 310 F. 2d 312, 315; *Strubbe* v. *Sonnenschein*, 2 Cir., 1962, 299 F. 2d 185, 188-189; *Nolan* v. *Transocean Air Lines*, 2 Cir., 1961, 290 F. 2d 904, cert. denied, 368 U. S. 901; *Cooper* v. *American Airlines, Inc.*, 2 Cir., 1945, 149 F. 2d 355, 359; *Summers* v. *Wallace Hospital*, 9 Cir., 1960, 276 F. 2d 831, 833-834. See Corbin, *The Laws of the Several States*, 50 Yale L. J. 762, 775 (1941); Clark, *State Laws in the Federal Courts: The Brooding Omnipresence of Erie* v. *Tompkins*, 55 Yale L. J. 267, 290 *et seq.* (1946).

Appendix A

B

SUMMARY OF REASONING OF OPINION

As the case was presented to us in the briefs of both appellant and appellee, with abundant discussion of what are called majority and minority views, and references to lines of decision said to be or not to be analogous, one would suppose it to be well-nigh impossible to formulate in precise terms the rule of policy of the State of New York that controls the decision of this case. As so often happens, however, we think legal analysis and adherence to principles of general application lead us to a satisfactory solution of the problem. Accordingly, and prior to a detailed discussion of the pertinent authorities, we have thought it proper to state the principles and the method of analysis by which we now decide this case.

We are not here concerned with the doctrine of sovereign immunity, as we would be if the defendant were a member of the family of nations or one of the sovereign states of the United States of America. We are concerned with a political subdivision of the State of Washington, created by statute, and falling in the same general category as municipalities, counties, villages, and a great variety of other state instrumentalities. These political subdivisions, created by the legislation of states, engage in a great variety of undertakings, thus presenting a wide spectrum of activities, ranging from the operation of the police force and the fire department down to miscellaneous small business undertakings. In the course of time a vast body of decisional law developed and many attempts were made to establish a formula to separate the cases in which the creditor was to be permitted to pursue his normal remedies from those in which the instrumentality was given immunity. Majority

and minority views were expressed and various interpretations given in particular cases of "governmental" as distinguished from "proprietary" functions. In some states, such as New York, the doctrine of governmental immunity for state instrumentalities has gone through several stages of development, with a distinct tendency to circumscribe more and more the instances in which immunity will be granted. From first to last, however, and almost universally in this country the basic test, however obscured by attempts to reconcile the irreconcilable, remained: If the creditor was permitted to pursue his remedies would this substantially interfere with the fulfillment by the instrumentality of the essential public functions for which it was created?

By a process of our own independent analysis we have arrived at the conclusion that sound legal reasoning compels a decision to the effect that in this particular *quasi-in-rem* proceeding the levy upon the funds of the District on deposit with Bankers Trust Company should be set aside and the funds deemed immune from attachment only if permitting such levy to remain in force would substantially interfere with the fulfillment by the District of its essential public functions. In the discussion that follows we have stated our reasons for holding that the New York courts would be of the same view, if this case were to be decided by the New York courts today.

In so holding, however, we do not dispose of the case, as Judge Noonan decided it on a different theory, and merely held that the District was immune from suit because its functions were of a "governmental" character. Accordingly, we reverse and remand for a determination by the District Court, of the critical issue: If the levy is permitted to stand will it substantially interfere with the fulfillment

by the District of its essential public functions? On this issue there is much to be said pro and con, as will appear in the ensuing treatment of the subject. We think the interests of justice require that the initial decision should be made below. In view of what is said in this opinion the parties may desire to submit further affidavits or a stipulation of facts. In this posture of the case we think the wise course for us to pursue with reference to the trust feature of the litigation is to leave that for consideration by the District Court on the remand. Indeed, a penetrating and thorough study of the effect of permitting the levy to stand, upon the carrying out of its essential functions by the District, may depend upon the proper construction to be given to the Bond Resolution. Moreover, if it is found on the remand that permitting the levy to stand will substantially interfere with the governmental functions of the District the levy will be vacated, and it will again be unnecessary to decide the trust aspect of the case.

C

Under New York Law the Activities of the District Were Governmental and Not Proprietary

The parties agree, and the New York authorities cited above make it clear that if the funds in question were related to "proprietary" rather than "governmental" activities of the District, the doctrine of governmental immunity cannot afford these funds an immunity from attachment levy. The Contractor's attempt to establish the "proprietary" nature of the District's activities, however, is not convincing. We agree with Judge Noonan's holding that the funds here were to be devoted to "governmental" purposes.

Appendix A

In a variety of situations the New York courts have explained that activities of a governmental body are "public" if they involve "a matter of State concern for the benefit of the people of the State" (*People ex rel. Buffalo & Fort Erie Public Bridge Authority* v. *Davis*, 1938, 277 N. Y. 292, 298, 14 N. E. 2d 74, 76), or if "essentially public and for the general good of all the inhabitants" or if for the "common good and general welfare of the people." *Sun Printing & Publishing Ass'n* v. *Mayor, etc. of The City of New York*, 8 App. Div. 230, 238, 40 N. Y. Supp. 607, 611 (1st Dep't 1896), affirmed, 1897, 152 N. Y. 257, 265, 46 N. E. 499, 500. Indeed, since a governmental body exists solely for the purpose of benefiting its people and providing for the general good, it is quite difficult to understand how any public body that is not acting *ultra vires* can function in any other than a public manner. The New York Court of Appeals long ago commented that it was difficult to "appreciate the distinction suggested between the public and private functions" of a governmental body. *Darlington* v. *City of New York*, 1865, 31 N. Y. 164, 199.

There is no doubt, however, that a distinction has been drawn, and with it has developed a considerable body of law on the differentiation between the "governmental" and the "proprietary" functions of public bodies. The distinction originally seems to have been developed in an attempt to mitigate the harsh rule that formerly prevailed holding governments immune from liability in tort for harm done by their officers and agents, and with the abandonment in New York of this unfortunate rule much of the basis for the distinction itself has disappeared. *New York City Transit Authority* v. *Loos*, 2 Misc. 2d 733, 739, 154 N. Y. S. 2d 209, 215-216 (Sup. Ct. 1956), affirmed,

3 App. Div. 2d 740, 161 N. Y. S. 2d 564 (4th Dep't 1957). See *Brush* v. *Commissioner*, 1937, 300 U. S. 352, 362-363 (often cited by New York courts for its discussion of the distinction between "governmental" and "proprietary" functions); *Port of Seattle* v. *International Longshoremen's & Warehousemen's Union*, 1958, 52 Wash. 2d 317, 319-320, 324 P. 2d 1099, 1101. Nevertheless, until the New York courts formally abandon the distinction in the field of governmental immunity from attachment levy, we are bound to honor and apply it as we think the New York courts would. *Cf. Scull* v. *District of Columbia*, D. C. Cir., 1957, 250 F. 2d 767, 768, n. 2, cert. denied, 356 U. S. 920.

Under Washington law the District is clearly a governmental body acting properly within its jurisdiction. *Public Utility District No. 2 of Grant County* v. *Washington State Power Commission, supra*, 46 Wash. 2d at 234, 280 P. 2d at 265. When we consider the nature of the activity undertaken by the District to meet the power needs of its inhabitants and thereby to promote the industry and the economic life of the community, even omitting consideration of the federal navigation and flood control aspects of the matter so intimately connected therewith, and when we survey the policy of the New York legislature and courts so often expressed, that similar activities of New York governmental bodies are "public" in nature,[3] and considering addition-

3 New York Public Authorities Law, Article 5, *passim*; *Easley* v. *New York State Thruway Authority*, 1956, 1 N. Y. 2d 374, 153 N. Y. S. 2d 28, 135 N. E. 2d 572; *New York City Tunnel Authority* v. *Consolidated Edison Co.*, 1946, 295 N. Y. 467, 68 N. E. 2d 445; *Bush Terminal Co.* v. *City of New York*, 1940, 282 N. Y. 306, 26 N. E. 2d 269 (Port of New York Authority); *People ex rel. Buffalo & Fort Erie Public Bridge Authority* v. *Davis*, 1938, 277 N. Y. 292, 14 N. E. 2d 74; *Gaynor* v. *Marohn*, 1935, 268 268 N. Y. 417, 198 N. E. 13 (Albany Light, Heat and Power District) (citing many examples at page 424, 198

ally the broad New York definitions of "public" activities in general, discussed above, and the liberal application of such definitions undertaken by the New York Court of Appeals in recent years (*Nehrbas* v. *Incorporated Village of Lloyd Harbor*, 1957, 2 N. Y. 2d 190, 194-195, 159 N. Y. S. 2d 145, 148-149, 140 N. E. 2d 241, 243-244), we are hard put indeed to find support for a holding that the "proprietary" classification, originating in a special and now principally outmoded context, is properly applicable to the activities of the District. We are told, however, that two of the principal New York cases cited above, as well as certain special features of the District's operations, compel a finding of "proprietary" activity. We have examined these contentions and we do not find them persuasive.

In *Harman* v. *City of Fort Lauderdale, supra*, 134 Misc. at 135, 234 N. Y. Supp. at 198, the court stated that the function of the governmental body there, the construction and maintenance of harbor improvements, was "private and proprietary." The cases cited in support of this determination generally involved operations of the New York City subway system and of various municipal waterworks, and either utilize the distinction in order to state a rule

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3 (Continued.)

N. E. at 15); *Robertson* v. *Zimmermann*, 1935, 268 N. Y. 52, 196 N. E. 740 (Buffalo Sewer Authority); *In re White*, 31 Misc. 2d 644, 222 N. Y. S. 2d 208 (Sup. Ct. 1961) (New York Power Authority); *Superintendent of Public Works* v. *Paonesso*, 14 Misc. 2d 787, 182 N. Y. S. 2d 223 (County Ct. 1958) (New York Power Authority); *Cuglar* v. *Power Authority of the State of New York*, 4 Misc. 2d 879, 163 N. Y. S. 2d 902 (Sup. Ct. 1957), affirmed, 4 App. Div. 2d 801, 164 N. Y. S. 2d 686 (3rd Dep't 1957), affirmed, 1957, 3 N. Y. 2d 1006, 147 N. E. 2d 733, 170 N. Y. S. 2d 341.

of governmental liability for negligence;[4] or the distinction is irrelevant because the decision is based upon some other principle or rule, such as that property cannot be taken without compensation[5] or that a statute imposed liability;[6] or the distinction is inapplicable because the holding is that the activity is governmental;[7] or the circumstances of the case were completely *sui generis*.[8] So far as the negligence cases are concerned, it may be noted that New York now agrees with the general viewpoint that they are in a class by themselves without real significance in other contexts. *Nehrbas v. Incorporated Village of Lloyd Harbor, supra*, 2 N. Y. 2d at 194, 159 N. Y. S. 2d at 148, 140 N. E. 2d at

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4 *Litchfield Construction Co.* v. *City of New York*, 1926, 244 N. Y. 251, 155 N. E. 116 (negligence causing pecuniary injury); *Lloyd* v. *City of New York*, 1851, 5 N. Y. 369 (this case involved the cleaning of sewers, concerning which see *Nehrbas* v. *Incorporated Village of Lloyd Harbor, supra*, 2 N. Y. 2d at 194-195, 140 N. E. 2d at 243-244, 159 N. Y. S. 2d at 148-149).

5 *In the Matter of the Board of Rapid Transit R.R. Commissioners of the City of New York*, 1909, 197 N. Y. 81, 90 N. E. 456.

6 *New York & Queens Electric Light & Power Co.* v. *City of New York*, 221 App. Div. 544, 224 N. Y. Supp. 564 (1st Dep't 1927).

7 *Sun Printing & Publishing Ass'n* v. *Mayor, etc. of the City of New York, supra*, 152 N. Y. 257, 46 N. E. 499; *Admiralty Realty Co.* v. *City of New York*, 1912, 206 N. Y. 110, 99 N. E. 241; *Matter of Low*, 1922, 233 N. Y. 334, 135 N. E. 521; *Van Horn* v. *Kittitas County, Wash., supra*, 28 Misc. 333, 59 N. Y. Supp. 883.

8 *Moran* v. *Long Island City*, 1886, 101 N. Y. 439 (holding that a default judgment could be taken against a municipality as against any other corporation, based upon a finding of clear legislative intention to subject such body to this procedure); *Matter of City of New York*, 127 Misc. 710, 217 N. Y. Supp. 544 (Sup. Ct. 1926) (exception to general rule that adverse possession does not apply against governmental bodies, Annot., 55 A. L. R. 2d 554 (1957), in situation where municipality itself had conveyed the property and time ran while in possession of grantee; municipal market involved here).

243; *Burgess* v. *Kansas City*, 259 S. W. 2d 702, 703 (Mo. App. 1953). Further, in later cases New York has recognized the governmental nature of operations of the New York City subways and of municipal waterworks. *New York City Transit Authority* v. *Loos*, *supra*, 2 Misc. 2d at 737, 154 N. Y. S. 2d at 214; *Civil Service Forum* v. *New York City Transit Authority*, 4 App. Div. 2d 117, 163 N. Y. S. 2d 476 (2d Dep't 1957), affirmed, 1958, 4 N. Y. 2d 866, 174 N. Y. S. 2d 234, 150 N. E. 2d 705; *Wallerstein* v. *Westchester Joint Water Works No. 1*, 166 Misc. 34, 37, 1 N. Y. S. 2d 111, 114 (Sup. Ct. 1937). The authority of *Harman* and its applicability to the case before us is further weakened by other New York decisions which hold that navigation and harbor improvements, the subject matter actually involved in *Harman*, are matters of public concern and are governmental functions. *People* v. *Baltimore & Ohio R.R. Co.*, 1889, 117 N. Y. 150, 156-157, 22 N. E. 1026, 1027-1028; *Losei Realty Corp.* v. *City of New York*, 1930, 254 N. Y. 41, 47, 171 N. E. 899, 901. Moreover, the significance of this 1929 case dealing with harbor improvements for the case before us, in 1963, dealing with electric power production and related matters beneficial to the entire State of Washington and the whole Northwestern region of our nation, is significantly reduced by the fact that New York recognizes that the concept of "governmental" versus "proprietary" is a practical matter which varies with time and circumstances. *Nehrbas* v. *Incorporated Village of Lloyd Harbor*, *supra*, 2 N. Y. 2d, at 195, 159 N. Y. S. 2d at 148-149, 140 N. E. 2d at 243.

Finally, it may be noted that in the cases cited by *Harman* which hold or declare activities to be proprietary it appears that the courts believed the operations would be conducted for the purpose of earning "profit," in the

same manner that profit is earned by a business.[9] In the instant case, however, the record clearly establishes that sales under the purchase contracts will be entirely at cost, and that any "revenues" which the District may have in the accounting sense that income exceeds expenses will be expended to retire indebtedness, establish working capital and reserves for expansion and contingencies, or reduce or stabilize rates. It appears that in *Harman* the record did not establish this absence of business type "profit," and for this reason alone, without considering the federal governmental aspects of the matter, *Harman* is distinguishable from the case before us.

Doyle v. *City of Astoria, Ore., supra*, 147 Misc. 127, 262 N. Y. Supp. 572, is similarly distinguishable, for the holding that the municipal operation of a waterworks was "proprietary" seems to have been based on the belief that the record there established an operation for profit. We may note too that the authority of *Doyle* is considerably weakened by its reliance upon the same type of authorities as were cited in *Harman*,[10] and because of the changes in New York law on the very subject matter dealt with in the case itself.

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9. *In the matter of the Board of Rapid Transit R.R. Commissioners of the City of New York, supra*, 197 N. Y. at 96, 90 N. E. at 460; *Matter of City of New York, supra*, 127 Misc. at 723, 217 N. Y. Supp. at 557; *Litchfield Construction Co.* v. *City of New York, supra*, 244 N. Y. at 263, 155 N. E. at 119 (relying upon the *Rapid Transit R.R. Commissioners* case); *Lloyd* v. *City of New York, supra*, 5 N. Y. at 374 (relying upon cases stressing "private advantage" of the governmental body); *New York & Queens Electric Light & Power Co.* v. *City of New York, supra*, 221 App. Div. at 547-548, 224 N. Y. Supp. at 568-569 (relying upon the *Rapid Transit R.R. Commissioners* case and other cases stressing "profit" aspects).

10. The only new authorities cited are *Oakes Mfg. Co.* v. *City of New York*, 1912, 206 N. Y. 221, 99 N. E. 540 and *Canavan* v. *City of Mechanicville*, 1920, 229 N. Y. 473, 128 N. E. 682, both negligence cases which either stress or rely upon cases stressing the profit possibility.

Appendix A

We come now to the special features of the District's operations which the Contractor contends establish a "proprietary" classification. First, the Contractor notes that two-thirds of the power produced by the Project has been sold to purchasers for a fifty year period "and for delivery outside of the District's corporate limits." Second, under the purchase contracts the District's operation of the Project is subjected to certain arbitration procedures and this, we are told, is "incompatible with the exercise of governmental power by the District."

The Project was made possible only by virtue of the approval of the Congress and the Federal Power Commission, both of which bodies conceived of the Project as a part of a "comprehensive plan" for the development of the entire Northwestern region, considered the District to be operating as a "public body", and required it to devise a plan for the "equitable distribution" of the power produced by the Project. There is no doubt that the power sales contracts made in an attempt to comply with the federal mandate, principally with other governmental bodies, fulfilled the requirement of such an equitable distribution, and that the one-third output that remained available to the District more than met the estimated power needs of the District. In the light of the New York authorities which recognize that the product of governmental operations may be charged off to its users and contracts entered into for the sale of surplus output, such "commercial" aspects of the program being merely "incidental" to the ultimate governmental purpose of promoting the welfare of the community, the power purchase contracts in themselves hardly support the conclusion urged by the Contractor. *New York City Tunnel Authority* v. *Consolidated Edison Co.*, *supra*, 295 N. Y. at 476, 68 N. E. 2d at

449; *Bush Terminal Co.* v. *City of New York*, *supra*, 282 N. Y. at 321-322, 26 N. E. 2d at 276; 1957 Opinions of Attorney General (N. Y.), page 137. See *Brush* v. *Commissioner*, *supra*, 300 U. S. at 372-373.

Nor do we find significant the fact that the power sold to the various purchasers is delivered at a station "a long seven miles" from the territorial jurisdiction of the District for use in other states. So far as the District is concerned the primary purpose of the Project is to benefit the community it serves, and the State of Washington, and if along with this comes benefit to a number of surrounding states through the device of selling unneeded surplus power at cost, as part of an equitable distribution commanded by the federal authorities empowering the District to go ahead with the enterprise, all this is surely "incidental" within the meaning of New York law and does not convert the governmental function of the District into a proprietary one. *Cf. Simson* v. *Parker*, 1907, 190 N. Y. 19, 22, 82 N. E. 732, 733.

Nor do the arbitration provisions change the matter. It appears that these were inserted merely as a convenience to enable the purchasers to participate "in an orderly way" in the consideration of problems relative to the Project; and it was specifically agreed that arbitration should bind the parties only "insofar as the parties hereto may legally do so," and in any event would not cover "such matters which are by law vested exclusively in the discretion of the District." Moreover, it was agreed that the arbitration provisions, if found unenforceable, were to be severable from the remainder of the agreement. We are cited to, and have found no New York decision which suggests that under these circumstances the District's op-

erations in the instant case are denuded of their otherwise governmental character and reduced to a "proprietary" status because of these severable and incidental features, and we can perceive no reason why we should so hold. Indeed, the New York, and other authorities generally, suggest that arbitration is a perfectly proper device for governmental bodies having the capacity to contract. *Brady* v. *Mayor, etc. of Brooklyn*, 1 Barb. 584, 589-590 (Sup. Ct. 1847). See 17 McQuillin, *Municipal Corporations*, Section 48.20, page 127 (3rd ed. 1950); Annot., 40 A. L. R. 1370 (1926).

Before we leave the subject of the distinction between "governmental" and "proprietary" functions there is a further argument of the Contractor to be disposed of. In effect the contention is that to come under the doctrine of governmental immunity from attachment levy the District's activities must have been both "governmental and local." We find nothing in the decisions and comments of legal scholars that lends any support to the Contractor's argument. The phrase "neither governmental nor local" was used in *Harman* v. *City of Fort Lauderdale, supra*, 134 Misc. at 137, 234 N. Y. Supp. at 200, merely by way of incidental description in distinguishing certain authorities that the court found inapplicable to the case before it, and apparently on an entirely separate issue,[11] While this phrase

11 The court seemed to address itself to the issue of whether a foreign governmental body has a local situs so that it cannot be sued outside its own geographical bounds, and distinguished three cases thought relevant on this issue. *Parks Co.* v. *City of Decatur, Ill.*, C. C. A. 6, 1905, 138 Fed. 550, 553-554; *Board of Directors of St. Francis Levee Dist.* v. *Bodkin*, 1902, 108 Tenn. 700, 708-710, 69 S. W. 270, 271-272 (this case dealt with both the governmental immunity and the local situs problems); *Mayor, etc. of Baltimore* v. *Root*, 1855, 8 Md. (Perkins) 95 (the local situs issue actually seems not to have been raised here). See 17 McQuillin, *supra*, Section 49.15, pp. 177-182; Annot., 93 A. L. R. 500 (1934).

was repeated by the district court in *Murdoch v. City of Asbury Park, supra,* 48 F. Supp. at 23, it was entirely unrelated to the *ratio decidendi* in that case.

In a proper case the physical locus of the activities of a governmental body may be a relevant factor in determining whether its activities are truly "governmental" (cf. 18 McQuillin, *supra,* Section 53.100, pp. 414-415), but in the case before us we cannot agree that the fact that the power is distributed from a substation seven miles outside the District and that the Project as a whole affects several states and a wide area, renders the District's activities "proprietary." Nor can we understand why the activities of the district, which we hold to be governmental, should necessarily be beyond the province of the doctrine of governmental immunity from attachment levy because of the above-described incidental and non-local features.

D

WILL THE LEVY UPON THE FUNDS ON DEPOSIT WITH BANKERS TRUST COMPANY INTERFERE WITH THE GOVERNMENTAL ACTIVITIES OF THE DISTRICT?

This brings us to what we think is the heart of the case. Construction of the dam has been completed and the Project is now in active operation. The very funds now levied upon were specifically set aside for payments to contractors and others. If it be true that a levy upon these funds can have no detrimental effect upon the performance by the District of the activities we have already held to be governmental in character, how can there be any basis in principle, in this *quasi-in-rem* proceeding, for a holding that the doctrine of governmental immunity justifies or requires the vacation of the warrant of attachment, the setting aside

of the levy, and the dismissal of the action? We are also of the view that there can be no basis under New York law for such a ruling, if in fact a levy on these funds cannot in any substantial way interfere with the performance by the District of its public functions.

We start with the leading New York case, *Van Horn* v. *Kittitas County, Wash., supra*, 28 Misc. 333, 59 N. Y. Supp. 883. *Van Horn* involved an attempt to attach funds of a Washington County held by a bank for the purpose of paying interest on County bonds shortly to become due and payable at the bank. The nature of plaintiff's claim does not appear in the opinion. The court vacated the attachment, stating as follows (28 Misc. at 335, 59 N. Y. Supp. at 884):

> "It was not, however, the property of the county in any private or proprietary sense, but was acquired by it for a public purpose, in the exercise of its political powers, and was appropriated for a specific purpose inconsistent with its use for the discharge of the plaintiff's claim. * * *. It is well settled that property thus acquired, held and appropriated by a public corporation, is not subject to levy. In support of this proposition it is sufficient to cite Dillon on Municipal Corporations, vol. 1, § 100, where the learned author says:
>
> 'The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its creation thwarted. Based upon considerations of this char-

acter, it is the settled doctrine of the law that not only the public property but also the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or when in transit to it'."

The significance of the above language is that in New York the doctrine of governmental immunity from attachment levy is based upon sound reasons of public policy, and it follows, naturally, that when the reasons for such doctrine cease to exist the doctrine itself is inapplicable. Thus in *Doyle* v. *City of Astoria, Ore., supra,* 147 Misc. at 128, 262 N. Y. Supp. at 573, the New York court recognized that "a foreign municipal corporation under ordinary circumstances will be treated like any other corporation, and the court will take jurisdiction." Again, in *Harman* v. *City of Fort Lauderdale, supra,* 134 Misc. at 137, 234 N. Y. Supp. at 200, the court recognized that a municipal corporation should ordinarily be subjected to "the same liability to suit and attachment as would apply in the case of a private corporation exercising the same functions."

This same principle, indeed, is evident from analogous principles of New York law. Thus it is familiar law that New York has made serious inroads upon the traditional doctrine of sovereign immunity from suit. New York Court of Claims Act, Section 8; *Bernardine* v. *City of New York*, 1945, 294 N. Y. 361, 365, 62 N. E. 2d 604, 605; *Miller* v. *Town of Irondequoit*, 243 App. Div. 240, 241-242, 276 N. Y. Supp. 497, 499 (4th Dep't 1935), affirmed, 268 N. Y. 578, 198 N. E. 412; *Benz* v. *New York State Thruway Authority*, 1961, 9 N. Y. 2d 486, 491, 215 N. Y. S. 2d 47, 49-50, 174 N. E. 2d 727, 729 (dissenting opinion), cert. dismissed, 1962, 369

U. S. 147. So too, under Section 684 of the New York Civil Practice Act, with certain limitations, a New York governmental body must respond in garnishment proceedings against earnings or income of its employees. And the broad language of Section 687-a of the New York Civil Practice Act ("against a person upon whom service of process may be had within the county") suggests that ordinary contract debts due and payable by a New York governmental body are similarly garnishable. Se 1952 Report of the New York Law Revision Commission, page 363; New York Civil Practice Act Section 228; 22 Carmody-Wait, *Cyclopedia of New York Practice*, page 75 *et seq.* (1956). While it has been held that public bodies in New York are immune from levy of execution, *Matter of Donner-Hanna Coke Corp.* v. *Eberhardt*, 156 Misc. 41, 42-43, 280 N. Y. Supp. 607, 609 (Sup. Ct. 1935), this principle traces back to considerations of public policy enunciated in *Darlington* v. *City of New York*, *supra*, 31 N. Y. at 191-192.

What, then, are the considerations of public policy that lie behind the doctrine of governmental immunity from levy under a warrant of attachment? Unfortunately, we have found no New York authority attempting a thorough exposition of the basic principles. In Annot., 89 A. L. R. 863, 864-865 (1934), however, the matter has been put as follows:

> "The exemption of municipal funds or credits from execution or process of garnishment is predicated upon three theories:
>
> (1) That municipal funds or credits collected for particular governmental purposes constitute a trust fund for the accomplishment of those purposes, from which they may not be diverted by any attempt of

municipal creditors to appropriate them to the satisfaction of their claims, thus defeating the fulfillment of the purposes for which they were collected. [Citing cases.]

(2) That to subject the municipal funds and property to levy of execution and garnishment would restrict, thwart, and interfere with the proper and orderly functioning of the municipal governmental machinery. [Citing cases.]

(3) That to allow an individual municipal creditor so to reach municipal funds for the satisfaction of his claim would effect a preference in favor of such creditor, to the prejudice of other creditors, and to the ultimate prejudice of the credit of the municipality. [Citing cases.]"

In a helpful article, Coffin, *Enforcement of Judgments Against Municipal Corporations*, 17 Chi-Kent L. Rev. 226, 233 (1939), the following appears:

"The funds of a municipality as well as its real and personal property may be essential to maintain necessary governmental functions, and public policy should prevent the subordination of public interests to the demands of creditors. The test here, as in other creditor actions should be the extent to which the assets pursued are vital to the efficient rendition of basic public services."

And see 10 McQuillin, *supra*, Section 28.57, pp. 147-156; Dillon, *Municipal Corporations*, §§248-249 (5th ed. 1911); 4 Am. Jur. *Attachment and Garnishment*, §§358-359 (1936). *Cf. Larson* v. *Domestic & Foreign Commerce Corp.*, 1949, 337 U. S. 682, 703-704.

Appendix A

If an attachment levy were allowed against funds of a governmental body set aside to meet its general governmental responsibilities, fulfillment by that body of its general governmental duties might well be seriously impaired. *Van Horn* v. *Kittitas County, Wash., supra*, 28 Misc. at 335, 59 N. Y. Supp. at 884. So too, it would be quite disrupting if an attachment levy were allowed against funds of a governmental body set aside to accomplish a specific government function, where the claim of the creditor is unrelated to the specific governmental function and the project has not yet been completed. *Cf. Darlington* v. *City of New York, supra*, 31 N. Y. at 191-192; *Leonard* v. *City of Brooklyn*, 1877, 71 N. Y. 498, 499-500. Further, if funds are set aside to meet specific debts to a number of specific creditors, such as bondholders on a government bond issue, allowing an attachment levy by one creditor to the prejudice of others might adversely affect the financial standing of the governmental body and thereby indirectly result in a substantial interference with its ability to carry out its governmental functions. See *Vanderpoel* v. *Borough of Mount Ephraim*, 1933, 11 N. J. L. 423, 168 Atl. 575, 89 A. L. R. 862; *Snower* v. *Hope Drainage Dist.*, W. D. Mo., 1933, 2 E. Supp. 931, reversed on other grounds *sub nom. Groner* v. *United States ex rel. Snower*, 8 Cir., 1934, 73 F. 2d 126.

On the other hand, if specific funds are set aside to meet a particular obligation owed to a particular creditor, and if the latter has totally performed his own obligations, it is difficult to appreciate how an attachment levy by this creditor on this fund would thwart the governmental body in any manner other than is ordinarily experienced when an individual or government must pay its just debts. Although we have found no New York authority on the

point, in analogous situations a number of authorities in other jurisdictions find quite significant the fact of the completion of a contractor's obligations, especially where a specific fund has been set aside to meet the governmental obligation on such contract. *City of Laredo* v. *Nolle*, 1886, 65 Tex. 359, 361 (questioned in *Willacy County Water Control & Improvement Dist. No. 1* v. *Abendroth*, 1944, 142 Tex. 320, 177 S. W. 2d 936); *Holston Union Nat. Bank* v. *Knox County*, 1942, 179 Tenn. 259, 264-266, 165 S. W. 2d 382, 384-385 (noted with approval in 17 Tenn. L. Rev. 880, 1943); *Portsmouth Gas Co.* v. *Sanford*, 1899, 97 Va. 124, 129, 33 S. E. 516, 517; *First Nat. Bank* v. *Mays*, 1927, 175 Ark. 542, 545-546, 299 S. W. 1002, 1003; *Wheeler* v. *Walter J. Bryson Co.*, 1931, 162 Tenn. 163, 168-171, 35 S. W. 2d 391, 392-393; *State* v. *Blake Realty Co.*, 1933, 88 Utah 584, 597-598, 20 P. 2d 871, 876-877, modified on other grounds, 1936, 88 Utah 600, 56 P. 2d 1347; *Boyd, Higgins & Goforth, Inc.* v. *Mahone*, 1925, 142 Va. 690, 695-696, 128 S. E. 259, 261-262; Fordham, *Garnishment of Public Corporations*, 39 West Va. L. Q. 224, 230-231 (1933). Contra: *Leake* v. *Lacey*, 1895, 95 Ga. 747, 22 S. E. 655; *Dow* v. *Irwin*, 1915, 21 N. Mex. 576, 157 Pac. 490 (dissenting opinion criticizes majority on this ground). Since New York would apparently allow a creditor of a contractor to garnish a contractual debt owed the latter by a governmental body under New York Civil Practice Act Section 687-a, there is no reason to suppose that New York would not allow the contractor himself to reach a fund specifically set aside for him, and consequently we think that in such a situation New York would hold the doctrine of governmental immunity from attachment levy to be inapplicable.

So much for general principles. We must now consider the particular facts in the record before us. It is useful

first to consider the situation which prevailed at the time the construction contract was entered into and before actual construction had begun. Two funds are involved in this case, the Construction Interest and the Construction Funds. The moneys in the Construction Interest Fund were to be used to pay interest on the bonds during the period of construction of the Production System, and $33,484,379 was initially deposited into such fund. The moneys in the Construction Fund were to be used to pay the cost of acquisition of the Production System, and the initial deposit to such fund was $115,525,121.

At this stage the Contractor's attachment levy of the Construction Interest Fund would surely have disrupted the delicate relationship existing between the district and the bondholders and might have impaired its financial standing to such a degree as to have rendered difficult or impossible the carrying out of other funding operations connected with this and other projects. So too, even though the amounts due this Contractor were estimated to be 94% or 96% of the total costs listed as payable out of the Construction Fund, an attachment levy upon the Construction Fund at this point, before the purchase of the necessary land or equipment or the actual beginning of construction and the other relevant work, would have threatened the Project to such a degree that the New York courts would almost certainly not have allowed the levy to stand. We think a similar result would follow at any point prior to completion of the power features of the Project, for any hitch or disruption pending completion of such a complex enterprise might well produce dire consequences.

We are told, however, that on September 28, 1961, the District's Construction Engineer certified to the District that construction by the Contractor was complete, and

we are told further that the Project, so far as its power features are concerned, is now in full operational use. As of March 7, 1962, the date upon which the levy was made, the value of the Construction Interest Fund and the Construction Fund were, respectively, $4,799,152.10 and $18,891,051.31. Section 17 of the Bond Resolution provides that after certification of completion by the Construction Engineer and acceptance by the District, and after payment or setting aside of the costs of acquisition and construction (and after payment of interest during the construction period), any surplus in the Construction Interest Fund should be transferred to the Construction Fund for payment of any bonus due the Contractor, and any balance in the Construction Fund should then be transferred to the Reserve Account in the Bond Fund to pay principal, interest, and premium, if any, on the bonds.

The significance of these additional circumstances, however, cannot be accurately gauged on the record before us because neither the parties nor the court below gave consideration to what we now find to be decisive of the case. Despite the fact that the principal construction work has been completed by the contractor, there may well be relevant work still to be done by others, payments to whom are provided in the Construction Fund. The navigation and flood control features have certainly not been completed and certain preliminary work may well have been done, payments for which may involve the Construction Fund. The affidavits of the District tell us that the Corps of Engineers "is still acting as the land acquisition agency for the District," but it is far from clear whether there is any relation between such work and the Construction Fund. Provision is made for payments to other persons listed under the Con-

struction Fund, such as the administrative staff, engineers, trustees and others performing various functions. Whether or not they have been paid does not appear. Data relative to interest payments is lacking and there is nothing to show what will be the significance, if any, of preventing surplus funds from moving to the Reserve Account in the Bond Fund. Thus, due to the way in which the critical issue has been submerged and disregarded by all concerned, we have no way of coming to a rational conclusion with respect to the practical consequences that may or will follow a decision that the attachment levy is valid. No fault is to be ascribed to counsel or anyone else for this unusual state of affairs. It is merely one of the very infrequent by-products of the decisional process, when new law is being developed and formulated.

A final comment may perhaps not be out of order. Like so many of the cliches and formulas so dear to the law in the days of our youth, the attempted distinction between "governmental" and "proprietary" functions may well have outlived whatever usefulness it ever had, and be on its way out of the law, and it is not unlikely that the scope of immunity enjoyed by state instrumentalities will be more and more restricted as time goes on. This need be no cause for lamentation. Some vestiges of governmental immunity will doubtless survive. We venture the prediction that the rule formulated by us this day, to the effect that a levy under an attachment in a *quasi-in-rem* proceeding against an out-of-state governmental instrumentality will be permitted to stand unless it effect will be substantially to interfere with the performance of the public duties of such instrumentality, rests on a solid foundation and will endure.

The order is reversed and the case remanded for further consideration by the District Court, not inconsistent with this opinion, and upon such further proofs and stipulations as the parties may be advised to submit.

Appendix A

First opinion on petition for rehearing

PER CURIAM:

Because of the novelty of some of the questions discussed in our opinion in this case, and the fact that there was little or no reference to these questions, or some of them at least, in the original briefs and on oral argument, we think it reasonable and proper to grant the parties an opportunity to file such further and supplemental briefs as they may desire. Main briefs must be filed on or before June 3, 1963, and answering briefs no later than June 10, 1963. We shall give the case further consideration after receiving these briefs. There will be no further oral argument. To the extent above indicated the petition for rehearing is granted.

Appendix A

Second opinion on petition for rehearing

PER CURIAM.

We have received and have given careful consideration to the supplemental briefs submitted by the parties in accordance with our memorandum filed May 17, 1963, and the brief submitted by the Attorney General of the State of New York, as *amicus curiae*. We reaffirm the views expressed in our original opinion and deny the petition for rehearing. There will be no further oral argument.

It is quite true that no New York court has ever stated the applicable rule in precisely the manner formulated by us. On the other hand, no case seems to have arisen presenting the special factual situation now before us and the claim that the rule announced by us is at odds with the legislative policy and the trend of law in New York is not supported by the authorities cited to us.[1]

We do not find the arguments advanced in opposition to our legal analysis of the case either persuasive or substantial. If the reason for the doctrine of governmental immunity ceases to exist in a given factual situation, we do no more than hold that the doctrine becomes inapplicable. The authorities now pressed upon our attention are all distinguishable and we cite them in the footnote merely for

1. New York Court of Claims Act, §8; Benz v. New York State Thruway Authority, 1961, 9 N. Y. 2d 486, 490, 215 N. Y. S. 2d 47, 174 N. E. 2d 727, cert. dismissed, 1962, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634; Matter of New York Post Corp. v. Moses, 1961, 10 N. Y. 2d 199, 203, 219 N. Y. S. 2d 7, 176 N. E. 2d 709; Matter of Brown v. Board of Trustees of Town of Hamptonburg, School District No. 4, 1952, 303 N. Y. 484, 488, 104 N. E. 2d 866, 34 A. L. R. 2d 720. The Attorney General also refers us to Easley v. New York State Thruway Authority, 1956, 1 N. Y. 2d 374, 378-379, 153 N. Y. S. 2d 28, 135 N. E. 2d 572;

purposes of reference.[2] What the principal argument of the District comes down to is that while we should adopt a reasonable application of the traditional governmental-proprietary distinction, at the same time intelligent jurisprudence must cease once the talismanic determination of "governmental" activity has been made.

The District earnestly assures us that the court below cannot conveniently make a finding on the remand to the effect that the attachment levy will or will not "substantially interfere with the performance of essential public functions" by the District, because an inquiry into the facts will be too "difficult," that the rule we have formulated is not "workable" or "practical." We had thought this bugaboo had long since been laid to rest. This argument has been advanced for generations and always to frustrate the doing of substantial justice whenever the

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2. Court of Claims Act, §20(3); Comment, 17 Cornell L. Q. 254 (1932); 10 Carmody-Wait, Cyclopedia of New York Practice, §91, page 135 (1954); 1 Dillon, Municipal Corporations, §248 (5th ed. 1911); Fordham, Local Government Law, page 623 (1949); Fordham, Garnishment of Public Corporations, 39 W. Va. L. Q. 224, 225 (1933); Larson v. Domestic & Foreign Commerce Corp., 1949, 337 U. S. 682, 704-705, 69 S. Ct. 1457, 93 L. Ed. 1628; Ashton v. Cameron County Water Improvement District No. 1, 1936, 298 U. S. 513, 534, 56 S. Ct. 892, 80 L. Ed. 1309 (dissenting opinion); East St. Louis v. United States ex rel. Zebley, 1884, 110 U. S. 321, 324-325, 4 S. Ct. 21, 28 L. Ed. 162; Murdoch v. City of Asbury Park, S. D. N. Y., 1942, 48 F. Supp. 18; Leonard v. City of Brooklyn, 1877, 71 N. Y. 498, 504; Matter of Deansville Cemetery Ass'n, 1876, 66 N. Y. 569, 572; City of Beacon v. County of Dutchess, 285 App. Div. 1050, 139 N. Y. S. 2d 462 (2d Dep't 1955); Matter of Donner-Hanna Coke Corp. v. Eberhardt, 156 Misc. 41, 42-43, 280 N. Y. S. 607, 609 (Sup. Ct. 1935).

The Attorney General also relies upon Darlington v. City of New York, 1865, 31 N. Y. 164, 192-193, and the trilogy of New York attachment cases discussed in our original opinion (Van Horn, Harman and Doyle).

facts of a given situation are complicated. But the courts have managed to deal successfully with matters far more intricate. We think the rule we have formulated is sufficiently precise and of such limited scope that it can be applied on the remand without delay or inconvenience, especially in the light of the explicit guidelines we have already set forth.

That New York's financial community will suffer as the result of our decision in this case we gravely doubt. And the suggestion that our ruling will adversely influence the fate of funds of New York governmental instrumentalities in other States seems to us to be even more farfetched.

We had not intended to do more than afford the parties an opportunity to advance such contentions as they might wish to submit relative to the novel features of the principles developed in our original opinion. But the District has included a new point not raised in the court below or in the briefs and oral argument on the appeal from Judge Noonan's order, to the effect that it is a substantive condition of the Washington statute creating the District (Revised Code of Washington, Title 54.16.110) that it may not be sued in the New York forum; and that, notwithstanding the New York rule as to governmental immunity from attachment levy, and despite the substantial contacts which New York has with the transactions here involved, the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution, requires the dismissal of this action. We reject this contention, not only because not within the ambit of our memorandum filed May 17, 1963, but also for the reason that the highest court of the State of Washington has authoritatively construed the state statute relied upon to concern only the procedural

matter of venue and to raise no substantive jurisdictional issues. Public Utility District No. 1 of Kitsap County v. Puget Sound Power & Light Co., 1953, 43 Wash. 2d 1, 260 P. 2d 315.[3] See Tennessee Coal, Iron & R. R. Co. v. George, 1914, 233 U. S. 354, 34 S. Ct. 587, 58 L. Ed. 997.[4]

Petition for rehearing denied.

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3. The Washington court reached this conclusion despite the fact that Laws of 1931, Chapter 1, §6(k), p. 18, provided that "all suits against the public utility district shall be brought in the county in which the public utility district is located." The court noted, 43 Wash. 2d at 3, 260 P. 2d at 317, that the original Revised Code of Washington (adopted by the 1950 Extraordinary Session of the Legislature) substituted the word "may" for the word "shall." Contrary to the District's contention that this case construed a "predecessor statute," the Legislature's retention of the word "may" by Enacted Laws 1955, Chapter 390, §12, p. 409, only confirms that the result there reached is determinative of the present state of the law.

4. The New York rule on the issue of whether a foreign governmental body has a local situs so that it cannot be sued outside its own territorial limits, discussed in footnote eleven of our original opinion, seems to have been settled by the New York courts in Van Horn v. Kittitas County, Wash., 28 Misc. 333, 59 N. Y. S. 883 (Sup. Ct. 1899), aff'd mem., 46 App. Div. 623, 61 N. Y. S. 1150 (1st Dep't 1899). At any rate, questions of venue or *forum non conveniens* have not been raised properly and cannot be considered by us at this time.

Appendix A

Order denying petition for rehearing *en banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MERRITT-CHAPMAN & SCOTT CORPORATION,
Plaintiff-Appellant,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Defendant-Appellee.

PETITION FOR REHEARING *IN BANC*

Root, Barrett, Cohen, Knapp & Smith, New York, N. Y. and Washington & Wickwire, Ephrata, Washington, for defendant-appellee.

All of the active judges concurring, except Judges Clark, Moore and Hays who vote to grant (Judge Friendly not participating in the consideration of the petition), the petition is denied.

Leonard P. Moore
Acting Chief Judge.

6 August, 1963.

APPENDIX B

New York Civil Practice Act

§912. Duties of sheriff in execution of warrant. The sheriff must execute the warrant immediately, by levying, in the manner prescribed in section nine hundred and seventeen of this act, upon so much of the property of the defendant, within his county, not exempt from levy and sale by virtue of an execution unless by law specifically made subject to attachment notwithstanding such exemption, as will satisfy the plaintiff's demand, with the costs and expenses.

If levy be made upon personal property capable of manual delivery by the sheriff taking the same into his actual custody, he must, without delay, deliver to the person, if any, from whose possession the property is taken, a certified copy of the warrant. In all other cases where personal property is levied upon by him, the sheriff must, upon making such levy, or as soon thereafter as may be practical, take into his actual custody all personal property capable of manual delivery, and, without delay, subject to the direction of the court or judge, collect, receive and enforce all debts, effects and things in action levied upon by him.

The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as may be necessary, until the amount of plaintiff's demand for which the warrant was granted, with the costs and expenses, has been levied upon or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

Subsequent levies under a warrant shall not apply to any property previously levied upon under the same warrant.

Appendix B

New York Civil Practice Law and Rules

§6202. Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 104 shall be construed to mean "defendant."

§5201. Debt or property subject to enforcement; proper garnishee. (a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

Appendix B

Preamble of the statute of the State of Washington pursuant to which petitioner was established

Washington Laws 1931, ch. 1, §1. The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.

Appendix B

Act of Congress authorizing the activity giving rise to this lawsuit

Public Law 544 (Laws of 83rd Cong., 2d Sess., c. 589, 68 Stat. 573).

AN ACT

To provide for the development of the Priest Rapids site on the Columbia River, Washington, under a license issued pursuant to the Federal Power Act.

Be it enacted by the Senate and House of Representatives of United States of America in Congress assembled, That the Flood Control Act of 1950 (64 Stat. 170, 179), insofar as it adopted and authorized to be prosecuted the Priest Rapids Dam on the Columbia River, Washington, substantially in accordance with the plans recommended in the report of the Chief of Engineers dated June 28, 1949, contained in House Document Numbered 531, Eighty-first Congress, second session, is hereby modified to permit the development of the Priest Rapids site by Public Utility District Number 2, of Grant County, Washington, or such district or its successor in combination with such other utilities as it may legally affiliate with or by any division, subdivision, agency, or commission of the State of Washington under and in accordance with the terms and conditions of a license duly issued pursuant to the Federal Power Act and in accordance with this Act.

SEC. 2. The Priest Rapids Reservoir site shall be developed to utilize the optimum capabilities of the site as a part of the comprehensive plan for economically feasible

control and utilization of the water resources for flood control, navigation, power, and other beneficial purposes. Before a license is issued, an applicant for a license shall submit a report on the details of its plans for development to the Federal Power Commission with particular reference to the integration of the proposed Priest Rapids development as a part of the comprehensive plan.

SEC. 3. The Department of the Army shall review any plans submitted to the Federal Power Commission for the purpose of acquiring a license to develop the Priest Rapids site or any other site in connection therewith and shall make recommendations with respect to such plans to the Commission with particular regard to flood control and navigation.

SEC. 4. The license may provide for the addition of navigation locks and flood-control features by the Department of the Army at Federal expense, either as a part of the initial construction or at a later date. In the event that nonpower features are to be provided as part of the initial construction, an allocation of costs to such features shall be approved by the Federal Power Commission taking into consideration recommendations by the Department of the Army and licensee, and funds to cover such costs may be appropriated and may be transferred by the Chief of Engineers to the licensee. If such navigation and flood-control facilities are not provided initially the licensee shall provide at its own expense the basic features for future installation of navigation and flood-control facilities.

SEC. 5. Upon request by the licensee the Corps of Engineers under direction of the Secretary of the Army shall be

authorized to receive contributed funds and act as constructing agency for part or all of the project, including acquisition of lands, easements, rights-of-way, or other interest in land in accordance with Federal laws and procedures governing flood-control projects and subsequent conveyance thereof to the licensee.

SEC. 6. The operation and maintenance of a project under license pursuant to this Act shall be subject to reasonable rules and regulations by the Secretary of the Army in the interest of flood control and navigation. To assure that there shall be no discrimination between States in the area served by the project, such license shall provide that the licensee shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighboring States and shall cooperate with agencies in such States to insure compliance with this requirement; *Provided*, That in the event of disagreement between the licensee and the power marketing agencies (public or private) in any of the other States within the economic market area, the Federal Power Commission may determine and fix the applicable portion of power capacity and power output to be made available hereunder and the terms applicable thereto. Power surplus to the requirements of the licensee and other non-Federal marketing agencies (public or private) within the economic marketing area, as may be economically usable to the Federal system, may be made available to and may be purchased by the Bonneville Power Administrator at rates not higher than the rates charged such non-Federal marketing agencies, and under such terms and conditions as shall be mutually agreeable to the licensee and the Secretary of the Interior. Such power may be co-

mingled with power from Federal dams in the Columbia River system for which the Bonneville Power Administrator has been designated marketing agent and shall be sold by the Administrator in accordance with the provisions of the Bonneville Project Act at established rate schedules.

SEC. 7. If an application for a preliminary permit for a license under the Federal Power Act to authorize the development of the Priest Rapids site is not prosecuted with reasonable diligence before the Federal Power Commission and in any event if the license application is not filed with the Federal Power Commission prior to the date which is two years after the date of the enactment of this Act, the provisions of this Act shall not be effective after such date and the authorization for the development of the Priest Rapids site contained in the Flood Control Act of 1950 shall have the same status it would have had if this Act had not been enacted. In the event an application for a license is made and denied by the Federal Power Commission, or if construction under a license is not carried out in a reasonable period of time as determined by the Federal Power Commission, the authorization in the Flood Control Act of 1950 will have the same status it would have had if this Act had not been enacted. Notwithstanding any other provision of law, the Federal Power Commission shall act, on any such application filed with it prior to such date, within one year after the date on which such application is filed.

Approved July 27, 1954.

Appendix B

Washington Statutes authorizing suit against petitioner and establishing that its property is not subject to execution

Rev. Code Wash. 54.16.110 May sue and be sued—Claims. A district may sue in any court of competent jurisdiction, and may be sued in the county in which it is located. No suit for damages shall be maintained against a district except on a claim filed with the commission complying in all respects with the terms and requirements for claims for damages filed against cities of the second class.

Rev. Code Wash. 6.04.140 Enforcement of judgment against public corporations. If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows:

(1) The party in whose favor such judgment is given may at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof.

(2) On the presentation of such transcript such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation.

(3) The certified transcript herein provided for shall not be furnished by the clerk unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the same judgment in respect to such money or damages be acknowledged as ~~in~~ ordinary cases. The clerk shall include in the transcript the memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum, no order upon the treasurer shall issue thereon.

Rev. Code Wash. 6.04.150 Attachment to compel officer to satisfy judgment. Should the proper officer of said corporation fail or refuse to satisfy said judgment, as in RCW 6.04.140 provided, an attachment [body attachment] may be issued to compel his performance of said duty.

APPENDIX C

List of representative bonds issued by governmental instrumentalities to finance public projects, where construction funds were held by New York banks pursuant to provisions similar to those here involved.

Issue	*Depositary*	*Purpose of Issue*	*Amount of Issue*
CHELAN COUNTY (WASHINGTON) PUBLIC UTILITY DISTRICT No. 1			
Rocky Reach Hydro-Electric System Revenue Bonds, Series of 1956, dated 11/1/56, due 1992	Chemical Bank New York Trust Co.	Construction of hydro-electric power project with a capacity of 710,000 k.w. on Columbia River.	$ 23,100,000
Rocky Reach Hydro-Electric System Revenue Bonds, Series of 1957, dated 12/15/57, due 2013	Chemical Bank New York Trust Co.	Completion of 775,000 k.w. hydro-electric power project on Columbia River.	$ 250,000,000
DADE COUNTY (FLORIDA) PORT AUTHORITY			
3⅛% Series A Bonds dated 10/1/54, due 1979	Chase Manhattan Bank	Acquisition of additional land for new construction and improvements at Miami International Airport.	$ 21,000,000
4.70% Series B Bonds dated 10/1/59, due 1999	Chase Manhattan Bank	Improvements to Miami International Airport.	$ 19,200,000
DOUGLAS COUNTY (WASHINGTON) PUBLIC UTILITY DISTRICT No. 1			
Wells Hydro-Electric Revenue Bonds, Series of 1963, dated 9/1/63, various interest rates due serially 1974/91, 4% term bonds due 2018	Chemical Bank New York Trust Co.	Construction of electric generating plant and associated facilities on Columbia River.	$ 184,000,000

JACKSONVILLE (FLORIDA) EXPRESSWAY AUTHORITY			
Expressway Revenue Bonds Series 1957, various interest rates, dated 1/1/57 due serially to 1977 and term bonds 1992	Morgan Guaranty Trust Company	Construction of certain extensions to expressway system.	$ 70,000,000
KANSAS TURNPIKE AUTHORITY			
Turnpike Revenue 3.38% Bonds dated 10/1/54, due 1994	Morgan Guaranty Trust Company	Construction of modern express highway extending from Eighteenth Street in Kansas City, Kansas to the Kansas-Oklahoma border by way of Lawrence, Topeka, Emporia, El Dorado and Wichita, Kansas.	$ 160,000,000
Kansas City Expressway Revenue Bonds dated 8/1/57. 5% due serially 1961/70, 4½% due serially 1971/3, 4⅜% due 1997	Morgan Guaranty Trust Company	Construction of Kansas City Expressway, extending southward on 18th St., Kansas City, Kansas from a junction with Kansas Turnpike at Muncie Expressway over Kansas River into Johnson County to a point on Roe Ave. south of Johnson Drive.	$ 19,500,000
NEW JERSEY TURNPIKE AUTHORITY			
Turnpike Revenue Bonds, 3¼% (1950 Issue) dated 1/1/50, due 1985	Chase Manhattan Bank	Construction of original New Jersey Turnpike.	$ 220,000,000
Turnpike Revenue Bonds, 3.20% (1951 Issue) dated 7/1/51, due 1986	Chase Manhattan Bank	Completion of original New Jersey Turnpike.	$ 35,000,000
OHIO TURNPIKE COMMISSION			
State of Ohio Turnpike Revenue Bonds, Project No. 1, 3¼%, dated 6/1/52 due 1992	First National City Bank	Construction of Turnpike extending 241 miles across Northern Ohio from western terminus of Pennsylvania Turnpike to the Indiana line.	$ 326,000,000

Appendix C

Issue	*Depositary*	*Purpose of Issue*	*Amount of Issue*
PUERTO RICO AQUEDUCT AND SEWER AUTHORITY			
Revenue Bonds (various interest rates), Series 1957	Chase Manhattan Bank	Construction of and improvements to water supply systems, filtration plants, mains and other projects including wells, reservoirs, pumping and other facilities and sewer lines.	$ 12,000,000
Revenue Bonds (various interest rates), Series 1960	Chase Manhattan Bank		$ 10,000,000
Revenue Bonds (various interest rates), Series 1962	Chase Manhattan Bank		$ 14,000,000
PUERTO RICO WATER RESOURCES AUTHORITY			
Twenty-four issues issued at various times during period 1947/63	First National City Bank	Electrical construction and improvement and extension programs.	$ 305,485,000 (aggregate)
TRUSTEES OF THE TULSA MUNICIPAL AIRPORT TRUST			
Revenue Bonds 4½% Series 1958, dated 6/1/58, due 1983	Chase Manhattan Bank	Improvements to American Airlines, Inc. base at Tulsa Municipal Airport.	$ 20,500,000
WEST VIRGINIA TURNPIKE COMMISSION			
State of West Virginia Turnpike Revenue 3¼%, 4⅛% Series A Bonds dated 3/1/52, due 1989	Morgan Guaranty Trust Company	Construction of 88-mile expressway from Charleston to Princeton, W. Va.	$ 133,000,000
		TOTAL	$1,822,785,000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Petitioner,

against

MERRITT-CHAPMAN & SCOTT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Argument	6
I. The decision below constitutes a correct formulation of applicable New York law	6
A. The Court of Appeals ruling that New York law governed the decision is not an issue	6
B. The decision below was correct and would have been reached by the New York courts	6
C. The Court of Appeals established a practical and workable test	13
D. There is no warrant for review by this Court at this preliminary stage of the litigation	15
II. The District vastly overstates the importance of the precedent established by the Court below	16
Conclusion	20
Appendix 1—New York Civil Practice Act §§902, 903	A-1

CITATIONS

Cases:

	PAGE
American Construction Co. v. Jacksonville, Tampa & Key West Ry., 148 U. S. 372 (1893)	16
Bernhardt v. Polygraphic Co., 350 U. S. 198 (1956)	7, 10
Doyle v. City of Astoria, Or., 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd without opinion* 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dep't 1933)	8, 9, 10, 11
East St. Louis v. United States ex rel. Zebley, 110 U. S. 321 (1884)	15
Erie R.R. v. Tompkins, 304 U. S. 64 (1938)	6, 10
Estate of Spiegel v. Commissioner, 335 U. S. 701 (1949)	7
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251 (1916)	16
Harman v. City of Ft. Lauderdale, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929)	8, 9, 10, 11
Huddleston v. Dwyer, 322 U. S. 232 (1944)	7
H. M. Hughes Co. v. Sapphire Realty Co., 11 N. Y. 2d 17, 181 N.E. 2d 407 (1962)	15
King v. Order of United Commercial Travelers, 333 U. S. 153 (1948)	10
Mertz v. Mertz, 271 N. Y. 466, 3 N.E. 2d 597 (1936)	11
Stubble v. Sonnenschein, 297 F. 2d 185 (2d Cir. 1962)	10
Summers v. Wallace Hospital, 276 F. 2d 831 (9th Cir. 1960)	10
United States v. Johnston, 268 U. S. 220 (1925)	12
Van Horn v. Kittitas County, Wash., 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co. 1899), *aff'd on opinion below* 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dep't 1899)	8, 9, 10, 11
Wheeler, Osgood Co. v. Fidelity & Deposit Co., 78 Wash. 328, 139 Pac. 53 (1914)	15

Statutes:

	PAGE
New York Business Corporation Law §1314(b)	17
New York Civil Practice Act §902	2, 6, 17
New York Civil Practice Act §903	2, 6, 17
New York Civil Practice Act §912	2, 6
New York CPLR §302	17
New York CPLR §6201	17
Rev. Code Wash. §60.28.010	14

Miscellaneous:

Devlin, *Samples of Lawmaking*	19
Note, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 Harv. L. Rev. 714 (1961)	13

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (App. A to Petition, pp. 1a-12a) is reported at 207 F. Supp. 443. The opinions of the Court of Appeals, including the original opinion (*id.*, pp. 13a-52a) and the opinions on the petition for rehearing (*id.*, pp. 53a-57a) are reported at 319 F. 2d 94. The order denying the petition for a rehearing *in banc* (*id.*, p. 58a) is unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

In a diversity action, the Court of Appeals interpreted New York practice statutes relating to provisional remedies available to New York creditors. The only question presented here, and the only ground on which a writ of certiorari is sought, is whether the decision below constitutes a reasonable and permissible interpretation of New York law.

Statutes Involved

The pertinent provisions of New York Civil Practice Act §§902 and 903 (pursuant to which the writ of attachment was issued) are set out in Appendix A, *infra*, at p. A-1. The pertinent provisions of New York Civil Practice Act §912 (pursuant to which the levy of attachment was made) are set out in Appendix B to the Petition, p. 59a.

Statement

Respondent Merritt-Chapman & Scott Corporation (M-C&S) is a Delaware corporation whose principal place of business is in New York, New York (JA 19a).* Petitioner Public Utility District No. 2 of Grant County, Washington (District) is a municipal corporation formed under the statutes of Washington and empowered for all corporate purposes, including the construction of facilities to furnish its inhabitants and others with electric power and the right to sue and be sued (App. A to Petition, pp. 15a-16a).

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* The Joint Appendix submitted to the Court of Appeals and filed with this Court is herein referred to as JA.

On July 9, 1956, M-C&S entered into a contract with the District in New York, New York for the construction of a hydroelectric dam and power plant on the Columbia River known as the Priest Rapids Project (JA 4a-5a). The contract established a construction period that called for completion by M-C&S of the Priest Rapids Project by October, 1961 (JA 118a), and M-C&S was required to supply the District with a performance bond of $45.9 million to protect the District against costs and damages in the event that M-C&S should fail to comply with the terms of its contract (JA 24a). The contract required the District's own engineers to issue a completion certificate when M-C&S's work under the contract was, after inspection, found to be complete and acceptable (JA 23a-24a).

In order to finance the Priest Rapids Project, the District issued $166,000,000 face value of revenue bonds, and funds from the sale of bonds sufficient for payment of the cost of acquisition and construction of the Project were deposited with Bankers Trust Company, New York, New York (JA 91a).

On September 28, 1961 the District's construction engineers, after the inspection called for by the contract, certified to the District that construction of the dam by M-C&S was completed and its work acceptable (JA 26a-27a, 33a-34a). Despite the completion certificate from its engineers, the District refused to make payments amounting to more than $10,000,000 due and owing to M-C&S consisting of retained percentages and bonus payments then due under the contract (*ibid.*). The dam is in full commercial operation by the District (JA 69a).*

* The record before the district court, filed in the spring of 1962, shows that the Priest Rapids dam was scheduled by the District for formal dedication by the Secretary of Commerce on June 2, 1962 (JA 72a).

When the District refused to pay over the funds claimed by M-C&S to be due on completion of construction, M-C&S filed suit against the District in the Supreme Court of the State of New York, County of New York, to recover the sum of $17,391,012 (JA 4a-17a). On March 7, 1962, the New York Supreme Court issued a warrant of attachment against funds of the District in New York (JA 39a-40a), and a levy was made thereunder on the construction funds on deposit at Bankers Trust Company, New York, New York, that were allegedly the property of the District (JA 68a). Subsequently, the summons and verified complaint were personally served upon the District in the State of Washington (*ibid.*).

On March 26, 1962, the District removed the action from the New York Supreme Court to the United States District Court for the Southern District of New York (JA 41a-43a). Prior to answering on the merits, the District moved to vacate the warrant of attachment and the levy thereunder and to set aside the service of summons (JA 44a).

The District's motion was based upon two grounds: (a) the District was a political subdivision of the State of Washington whose property was immune from attachment; and (b) the District's funds on deposit with Bankers Trust Company were trust funds and not property of the District subject to attachment (App. A to Petition, pp. 4a-5a). The district court determined the first issue in the District's favor and, therefore, found it unnecessary to decide the second issue, *i.e.*, the trust status of the funds (*id.*, p. 12a).

On appeal to the United States Court of Appeals for the Second Circuit, that court held, after an extensive review of New York statutory and case law:

> "• • • in this particular *quasi-in-rem* proceeding the levy upon the funds of the District on deposit with Bankers Trust Company should be set aside and the funds deemed immune from attachment only if permitting such levy to remain in force would substantially interfere with the fulfillment by the District of its essential public functions" (Appendix A to Petition, p. 32a).

The court then remanded the case to the district court for further hearings and proof (*id.*, p. 52a).

To guide the district court, the court below set down general rules as well as specific rules applicable to the facts of this case. Generally, the court noted the probability of substantial interference in the case of a levy either upon funds set aside by a municipal corporation to meet general governmental responsibilities or upon funds set aside for specific governmental functions unrelated to the attaching creditor's claim (*id.*, p. 48a). The court noted, however, that a levy upon specific funds set aside to meet a particular obligation owed to a particular creditor who had totally performed his own obligations would not, in the absence of further proof, be automatically considered as constituting substantial interference (*id.*, pp. 48a-49a).

The court then applied these general principles to the record before it, noting *inter alia* that an attachment levy "at any point prior to completion of the power features of the Project" would have had such adverse effects upon the District's performance of its public duties that a New York court would almost certainly have vacated the levy (*id.*, p. 50a). In remanding the case to the district court for further factual hearings and consideration in the light of its opinion, the court below stated its belief that "the interests of justice require that the initial decision should

be made below" (*id.*, p. 33a). The court below also directed the district court to determine the trust feature of the litigation, *i.e.*, whether the funds held by Bankers Trust Company are trust funds and, therefore, not property of the District subject to attachment and levy (*ibid.*), a legal issue that will be dispositive of the case if decided in the District's favor.

I.

The decision below constitutes a correct formulation of applicable New York law.

A. The Court of Appeals ruling that New York law governed the decision is not an issue.

The Court of Appeals noted at the outset of its opinion that:

> "* * * the first question for our consideration is the existence and nature of the limitation the New York courts would read into the attachment provisions of the New York Civil Practice Act, Sections 902, 903 and 912, based upon the District's claim of governmental immunity" (Appendix A to Petition, p. 29a).

The sole question presented by the present petition is whether the decision below, applying the federal doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938), is so in conflict with applicable state law that this Court should review the questions of New York procedure involved in the case.

B. The decision below was correct and would have been reached by the New York courts.

The Court of Appeals in the present case was required to decide a question of New York law without the guidance

of decisions by New York's highest court on the applicability of the relevant provisions of the New York Civil Practice Act to suits against foreign municipal corporations. It would be inconsistent with the orderly development of New York law for the Supreme Court of the United States to decide this technical point of New York procedure before the Court of Appeals of the State of New York has spoken. The sole question in this case at this preliminary stage is one which this Court should not review since it represents "the considered determination of [a] question * * * of state law by * * * [an] intermediate federal appellate court * * *", a court which should be regarded as expert as to the laws of the states within its circuit, see *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944); *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707-8 (1949). This is particularly true here where the opinion is by a judge whose statement of New York law should be given "special weight" not only because he is from the New York bar but because he taught other New York lawyers for many years, see *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204 (1956).

In spite of the recognized position of the court below as a qualified exponent of New York law, the District, in attempting to escape liability to suit in the New York courts, would have this Court believe that a state court would have inquired only whether the District's activities were "governmental" or "proprietary" and, if it determined that they were "governmental", would have vacated the levy and set aside service. It is, however, clear that reliance on the governmental-proprietary doctrine, particularly in a case of this kind, would serve no useful purpose and that the court below quite properly brushed aside verbalisms in arriving at its conclusion.

In fact, the decision of the court below was soundly based on New York precedent and represents a contemporary reformulation of the New York rule relating to the application of New York provisional remedies to foreign municipal corporations. Three New York cases have dealt specifically with the matters at issue here, *i.e.*, *Doyle* v. *City of Astoria, Or.*, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd without opinion*, 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dep't 1933); *Harman* v. *City of Ft. Lauderdale*, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929) and *Van Horn* v. *Kittitas County, Wash.*, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co. 1899), *aff'd on opinion below*, 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dep't 1899).

In *Doyle*, the plaintiff sued to recover unpaid interest on bonds of the defendant city and levied under a warrant of attachment against money that the defendant had deposited with a New York bank. The City of Astoria's motion to vacate the warrant and the levy thereunder was rejected by the court which stated:

> "A foreign municipal corporation under ordinary circumstances will be treated like any other corporation, and the court will take jurisdiction."

Similarly, in *Harman*, the plaintiff levied upon property of the defendant Broward County Port Authority, a municipal corporation organized under the laws of Florida. The defendant moved to vacate the warrant on the grounds that the court had no jurisdiction since the defendant was a foreign municipal corporation performing public functions and that the levy was invalid because the funds of the defendant in New York were funds of a municipality held for public purposes. In upholding the

warrant of attachment and the levy thereunder, the court rejected both arguments.

In *Van Horn*, the creditor plaintiff secured a writ of attachment against the defendant, a Washington county, and levied upon money of the defendant, deposited in a New York bank, which had been appropriated by the defendant to the payment of interest on its bonds. The defendant moved to vacate the warrant of attachment and, in the alternative, the levy thereunder. The court upheld the issuance of the warrant of attachment, stating that the defendant municipality was subject to suit in New York and that plaintiff could avail itself of the provisional remedies of New York statute; but it vacated the levy on the primary ground that the money deposited in New York "was appropriated for a specific purpose, inconsistent with its use for the discharge of the plaintiff's claim."

When *Doyle*, *Harman* and *Van Horn* are re-examined, it becomes clear that the decisions in those cases are consistent with the rule that a levy may stand unless it will interfere with the performance of the defendant's public duties—in *Van Horn*, a levy would have interfered with "payment of the interest on the outstanding bonds of said county", but in *Harman* the levy would interfere only with activities found by the court to be "in the nature of a private business enterprise engaged in with the hope of revenue" and in *Doyle* the court noted that the city had not proved "that the attachment levied by the plaintiff prevented the municipality from continuing to function". They do not support reliance on the anachronistic governmental-proprietary distinction since, as the opinion below demonstrates, the activities of the defendants in *Doyle* and *Harman*, in the light of subsequent New York

cases, are no less "governmental" than the activities of the District.

Indeed, applying the principles of the *Doyle*, *Harman* and *Van Horn* cases, the decision below is more favorable to the District than those cases would require. In all three, the warrants of attachment were upheld; and the levy was permitted to stand in all but *Van Horn*, where the fund was found to be appropriated for a specific purpose inconsistent with its use to pay plaintiff. Thus, the court below would have been warranted in formulating the "New York rule" as permitting a levy upon the funds of a foreign municipal corporation in New York whenever the fund in question was not specifically appropriated for an inconsistent purpose. In permitting a levy only if it would not substantially interfere with performance of the corporation's essential public functions, the court below granted the District greater protection than it might have received under a rigorous application of the three New York cases directly in point.

But even accepting the District's argument that the New York cases in point tend to a "rule" that there may be no attachment and levy against a municipal corporation acting in its "governmental" capacity, federal courts need not mechanically apply the language of trial courts. See *King* v. *Order of United Commercial Travelers*, 333 U. S. 153 (1948). Therefore, the Court of Appeals considered, in addition, a number of other relevant factors in determining what a New York court would do today and arrived at a reasonable and permissible result. In so doing, the Court of Appeals followed orthodox *Erie-Tompkins* doctrine. *Strubbe* v. *Sonnenschein*, 299 F. 2d 185 (2d Cir. 1962); *Summers* v. *Wallace Hospital*, 276 F. 2d 831 (9th Cir. 1960); see also *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 205 (1956).

The District seeks to strengthen its assertion that the Court of Appeals decision is in conflict with applicable New York law by citing several New York cases holding that governmental property of *New York* municipal corporations is exempt from levy of execution in the absence of an express statute permitting such execution. Nowhere, however, as the District cited any case or statute, and we have not been able to find any, where the New York courts or legislature have stated any general rule that the funds in New York of a *foreign* municipal corporation are exempt from New York remedial statutes relating to attachment and levy of execution. Thus, the essential connecting link between the cases cited by the District and this case is absent. Indeed, as we have shown above, there are decisions by New York courts holding that, in the case of foreign municipal corporations, there is no such general principle. See the *Doyle, Harman* and *Van Horn* cases, *supra*.

A New York court would not be concerned with any remedial limitations established by the internal policy of the State of Washington which authorized the creation of the District and waived its immunity from suit. As stated in *Mertz v. Mertz*, 271 N. Y. 466, 473, 3 N. E. 2d 597, 599-600 (1936):

> "The law of the forum determines the jurisdiction of the courts, the capacity of parties to sue or to be sued, the remedies which are available to suitors and the procedure of the courts. . . . Our courts are not concerned with the internal policy of the State which created the cause of action. They are concerned solely with the law of this State which determines the jurisdiction of its courts and the remedies that may be accorded here."

The major fallacy of the District's attack on the decision below is that it has ignored the factual context of that decision. The court below was careful to point out that upon the record before it, it was faced with the following situation:

> "Construction of the dam has been completed and the Project is now in active operation. The very funds now levied upon were specifically set aside for payments to contractors and others" (Appendix A to Petition, p. 43a).

If M-C&S's obligations have been completed and if the District has set aside a fund for the payment of such obligations on their completion, an attachment by M-C&S can result in no prejudice to the District. In these circumstances, *and they are the circumstances disclosed by this record*, there can be no interference with the public duties of the District but only with its ability to insulate itself from the payment of its just debts. We submit that the District ought to be held at least to minimum standards of commercial morality.

The District seeks to avoid the inevitable conclusions to be drawn from this record by claiming (Petition, p. 15, fn. 5) that the assumption of completion of the project in the decision below, based on uncontradicted affidavits, is unwarranted. But normally this Court "do[es] not grant a certiorari to review evidence and discuss specific facts", *United States* v. *Johnston*, 268 U. S. 220, 227 (1925), and no reason exists here for review of the Court of Appeals' view of the facts. In any event, the District will have ample opportunity to contest M-C&S's version of the facts in the district court to which the case has been remanded, and the district court will have an equal opportunity to evaluate the worth and the relevance, if any, of the District's defenses.

The Court of Appeals' refusal to be blinded by verbal tags is in line with a wealth of precedent. Increasingly, courts have drawn the line between activities of a municipal corporation for which it is liable for suit and those for which it is exempt from suit by examining the effects of the suit. Thus, a municipality may generally not be sued on causes of action arising out of activities supported by taxation since a judgment in these circumstances might well result in an imposition on taxpayers and on tax revenues. On the other hand, suits are generally permitted against municipalities arising out of activities supported by a charge to the users of a service since liability arising out of such activities permits the burden of recovery to be borne, through an adjustment of charges, by the users of the service. See Note, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 Harv. L. Rev. 714, 716-717 (1961). In this case, of course, the District's revenues arise from sales of power (in large part to private utilities outside of the District's boundaries), the charges for which are adjusted annually to take into account the District's costs (JA 82a). Thus, under accepted contemporary doctrine, the foregoing suit should be permitted.

C. The Court of Appeals established a practical and workable test.

The District argues that the rule laid down by the Court of Appeals is "unworkable". This assertion is apparently based upon the notion that the district court will be ill suited to determine whether the effect of M-C&S's levy "will be to substantially interfere with the public duties of [the District]". The assertion is demonstrably erroneous. The Court of Appeals set down both general and specific guidelines to assist the district court on

remand; these guidelines do not include the necessity to control the discretion of the District or to examine into the details of every District estimate and expenditure, as the District seems to believe.

The District apparently foresees that the district court will have serious difficulties in determining such questions of fact as:

> a. Is the project completed;
>
> b. What claims can be expected from persons other than M-C&S; and
>
> c. What is the effect of preventing the attached funds from moving to the Reserve Account in the Bond Fund?

These questions are not so complicated or difficult of determination as the District would have this Court believe. The contract between the District and M-C&S provides a clear and concise method of determination of completion of the project—the certificate of the District's own engineers. The burden of proof on the issue of completion is on M-C&S; it is a burden which M-C&S is fully prepared to meet.

With respect to claims from persons other than M-C&S, the District is protected from any unknown claims against funds set aside for construction by the provisions of Rev. Code Wash. §60.28.010, which require the District to withhold certain funds until thirty days after final acceptance of the work as completed and which require subcontractors, in order to secure a statutory lien against the District, to file a statutory notice of claim of lien within that thirty-day period. Thus, after the thirty-day statutory period, which may have run over two years ago because of the filing of the completion certificate by the

District's engineers,* the District will be insulated from claims of other persons arising out of the construction of the dam.

The District's third argument, based on the necessity of the determination of proper reserves to be set up against contingencies, is as illusory as its first two. M-C&S has levied upon the District's construction funds which must be used either for construction payments or, to the extent that the funds are not required for such purposes, for early retirement of its revenue bonds (App. A to Petition, pp. 23a-25a). Indeed, the District has already established, and is compelled to maintain, contingency reserves under its bond resolution, and these contingency reserves are not at issue in this suit.

The District's reliance upon *East St. Louis* v. *United States ex. rel. Zebley*, 110 U. S. 321 (1884), is misplaced. An analysis of that case reveals that what this Court did was to compel present and future payments to the plaintiff from tax revenues earmarked for payment of plaintiff's claim, while limiting the plaintiff's claim to unappropriated general tax revenues to actual surplus funds. In this case, M-C&S is also seeking to compel payment from a fund specifically established for the purpose of making such payments, the very thing permitted by this Court in the *East St. Louis* case.

D. There is no warrant for review by this Court at this preliminary stage of the litigation.

This case was decided by the district court on a motion to vacate a warrant of attachment and set aside the

* The acceptance of the work as completed by the District's engineers is binding upon the District. *See Wheeler, Osgood Co.* v. *Fidelity & Deposit Co.*, 78 Wash. 328, 139 P. 53 (1914); see also *H. M. Hughes Co.* v. *Sapphire Realty Co.*, 11 N. Y. 2d 17, 181 N.E. 2d 407 (1962).

levy thereunder and the service of summons. The district court did not deal with or decide the second major legal argument advanced by the District, *i.e.*, that its funds are trust funds and not property subject to attachment. Similarly, the Court of Appeals did not decide the trust issue but directed the district court to consider it, if necessary, upon the remand.

However, prior to any consideration of the trust issue, the Court of Appeals directed that there be further factual hearings in order to clarify the admittedly incomplete state of the paper record. In these circumstances, with both dispositive legal and factual findings as yet unmade by any court, it is premature for this Court to pass on the decision below. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U. S. 372, 384 (1893).

II.

The District vastly overstates the importance of the precedent established by the Court below.

The court below recognized that "no case seems to have arisen presenting the special factual situation now before us * * *" (App. A to Petition, p. 54a). Nevertheless, the District has attempted to escape this unique factual context and to give an unwarranted importance to the decision below by an erroneous argument, based largely upon facts outside of the record relating to bond issues involving construction funds underwritten in New York for out-of-state governmental instrumentalities.* With-

* It is noteworthy that the District does not enumerate which of the construction projects, financed by bonds underwritten in New

out case or factual support, the District alleges that the decision

> "affects the integrity of every such construction fund and any other New York deposit of sister state instrumentalities; jeopardizes every governmental instrumentality that may have sold such bonds in the immediate past, and complicates the problem of any such instrumentality that may in the future contemplate recourse to the New York market or that may have other needs for keeping funds in New York" (Petition, p. 21).

The District errs; this case could be used as precedent for the proposition that funds of out-of-state municipal corporations held by New York banks are subject to levy only when a plaintiff can meet certain rigorous standards. First, the plaintiff would have to demonstrate that the transaction fell within New York CPLR §6201 (the successor to New York Civil Practice Act §§902 and 903). Secondly, even a New York resident plaintiff could invoke jurisdiction over a nondomiciliary defendant under New York CPLR §302 only in certain restricted circumstances, including the transaction of business by the defendant in New York State, the commission by the defendant of a tortious act in New York State or the ownership, use or possession by the defendant of real property within New York State. Third, under New York Business Corporation Law §1314(b), a foreign corporation such as M-C&S

York, also involved *construction contracts made in New York*. It is also noteworthy that the amount of such issues involving construction funds will be reduced by over $1.3 billion, or approximately 75% of the figure furnished by the District in Appendix C to its Petition, if the issues five or more years old are eliminated; if Puerto Rican bonds "issued at various times during period 1947/63" (App. C to Petition, p. 70a) are excluded, the reduction is approximately $1.6 billion and 88%. Surely most construction funds will be paid out within five years after flotation of the issue.

could bring an action against a foreign municipal corporation only in even more limited circumstances, including the situation involved here, namely, an action for damages for the breach of a contract made within New York State. Finally, a foreign municipal corporation's funds in New York could not be levied upon in any circumstances if such a levy would substantially interfere with the performance by the foreign municipal corporation of its public duties.

Thus, the court below did not declare an open season for general creditors of the District or of any other foreign municipal corporation. The court held only that under New York statutory and case law the funds of a foreign municipal corporation, which has entered into a construction contract in New York and deposited funds in New York for the payment of its obligations thereunder, are subject to levy by the other party to the contract after the latter has completed its contractual performance, but only if such levy would not interfere with the defendant's public duties. To hold a foreign municipal corporation to such minimum legal standards in such carefully controlled circumstances could not possibly have the drastic and far-reaching consequences feared by the District.

Similarly, there is no warrant for the District's fear that the Court of Appeals decision will, by funneling business into the federal court, prevent the courts of New York from expressing themselves on the issues. The District's argument assumes that which it has failed to prove, namely, that there is a variance between the Court of Appeals' decision and New York law. The District also ignores the many considerations (*e.g.*, more limited discovery procedures, broader appellate review) that influence New York plaintiffs to use New York State courts.

But even in the highly unlikely event that New York State courts are not called upon to decide this and similar issues in the future, the remedy for other foreign municipal corporations is close at hand. The District has already interested the Attorney General of the State of New York in its cause. If the consequences feared by the District ensue, certainly the Attorney General can bring the statutory interpretation of the court below to the attention of the New York Legislature which has the power to modify, if it so desires, the terms of the statutes under consideration in this case. As stated in Devlin, *Samples of Lawmaking*, p. 22 (1962):

> "Statute is a more powerful and flexible instrument for the alteration of the law than any that a judge can wield. Its stretch is unlimited; it can overturn existing law, extend an old principle to any distance or reach out for a new one."

The District's final argument, set out in its conclusion, is that it should not be compelled to defend an action in New York. The quick answer to this assertion is that, so long as it enters into contracts in New York and deposits funds in New York for payment of its obligations under such contracts, it must be prepared to face this risk. The District should not be allowed to seek a change of venue under the guise of a motion to vacate an attachment. If the venue question is presented, M-C&S is prepared to prove, among other items, that its records and personnel necessary for a trial of this case have long been moved from the construction site in Washington to its other offices. The district court can then determine this question on the basis of evidence, not speculation. In any event, the question is not properly before this Court at this time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: November 25, 1963.

Respectfully submitted.

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APPENDIX 1

New York Civil Practice Act:

§902. *In what actions attachment of property may be had.* A warrant of attachment against the property of one or more defendants may be granted upon the application of the plaintiff, as specified in the next section, in any action for the recovery of a sum of money only. (N. Y. Sess. Laws 1920, C. 925, §902, as amended N. Y. Sess. Laws 1941, C. 253)

§903. *What must be shown to procure warrant of attachment.* To entitle the plaintiff to such a warrant, he must show that a cause of action specified in the last section exists against the defendant, and, if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all counterclaims known to him. He must also show that the defendant

1. Is either a foreign corporation or not a resident of the state; * * * (N. Y. Sess. Laws 1920, C. 925, §903, as amended N. Y. Sess. Laws 1941, C. 253)

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,

Petitioner,

against

MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondent.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
Question Presented	1
Statement of the Case	2
A. Facts and Statutory Background	2
B. Opinions Below	4
Interest of the State of New York	5
ARGUMENT:	
The judgment of the Court below unjustifiably subjected funds of a state instrumentality to attachment in another state. The Court of Appeals' holding, unless it is corrected on review by this Court, will permit private litigants to seize governmental funds in advance of trial and to harass public bodies by suing them in inconvenient forums	6
Conclusion	12

CASES

Benz v. New York State Thruway Authority, 9 N. Y. 2d 486, 174 N. E. 2d 727 (1961), *cert. dismissed*, 369 U. S. 147 (1962)	3, 10
Darlington v. Mayor of City of New York, 31 N. Y. 164 (1865)	7
Davenport v. Webb, 11 N. Y. 2d 392, 183 N. E. 2d 902 (1962)	11

PAGE

Matter of Donner-Hanna Coke Corp. v. Eberhardt, 156 Misc. 41, 280 N. Y. Supp. 607 (Sup. Ct. Erie Co. 1935) 7

Doyle v. City of Astoria, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd*, 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dept. 1933) 7, 11

Easley v. New York State Thruway Authority, 1 N. Y. 2d 374, 135 N. E. 2d 572 (1956) 3, 10

Great Northern Ins. Co. v. Read, 322 U. S. 47 (1944) .. 10

Harman v. City of Ft. Lauderdale, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929) .. 7, 9, 11

Kilberg v. Northeast Airlines, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961) 10

Leonard v. City of Brooklyn, 71 N. Y. 498 (1877) 7

Morris Plan Industrial Bank v. Gunning, 295 N. Y. 324, 67 N. E. 2d 510 (1946) 10

Pearson v. Northeast Airlines, 309 F. 2d 553 (2d Cir. 1962), *cert. denied*, 372 U. S. 912 (1963) 10

Van Horn v. Kittitas County, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co.), *aff'd on opinion below*, 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dept. 1899) 7, 11

W. K. Terry & Co. v. Hyde County, 33 Ohio App. 118, 168 N. E. 562 (1929) 9

STATUTES

	PAGE
Fed. R. Civ. P. 4(e)	2, 6
New York Civil Practice Act § 182-a	3
New York Civil Practice Law and Rules § 504	3
§ 505(a)	3
New York Court of Claims Act § 10	9
§ 11	9
§ 20(3)	4
Revised Code of Washington, Title 4.16.110	3

TEXTS

6 Am. Jur. 2d, Attachment and Garnishment § 1 (1963)	8
10 Carmody-Wait, Cyclopedia of New York Practice 135 (1954)	7

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BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of New York appears as *amicus curiae* to urge that this Court grant a writ of certiorari to review the judgment below, which substantially and adversely affected the interests of the State of New York, the State of Washington and each of the other forty-eight States of the Union.

Question Presented

May a plaintiff commence an action in New York against a public instrumentality of another State simply by attaching that instrumentality's New York bank deposits, thereby (1) obviating the need to sue the instrumentality in its home State and the corresponding duty to honor the special provisions of that State with respect to suits against

public bodies, and (2) evading the strong policies of both New York and the home State against allowing the seizure of governmental funds and against exposing public bodies to suit in distant forums?

The United States Court of Appeals for the Second Circuit, purporting to apply New York law, held that attachment of governmental funds is a valid means of beginning an action against out-of-state public instrumentalities in the New York courts. Since the newly effective amendment to Fed. R. Civ. P. 4(e) permits a plaintiff to commence a quasi-in-rem proceeding directly in a federal court and thus to by-pass any adjudication by the state courts of the validity of an attachment under state law, it is probable that this holding, unless corrected by this Court, will be taken as the governing law of the State and will expose millions of dollars of deposits held for governmental purposes to attachment in New York, and ultimately in other states, thereby depriving the public of the use of these funds and subjecting governmental bodies to suit in any forum where their funds may be found.

We submit that this question is one of overriding public importance, and that the holding of the Court of Appeals is at odds both with existing New York precedent and with New York's policies protecting its own instrumentalities and according a similar protection to instrumentalities of its sister states.

Statement of the Case

A. Facts and Statutory Background.

Respondents commenced this action in the New York courts by attaching funds of petitioner, a public instrumentality of the State of Washington, deposited in a New York bank (R. 39a-40a).* After the case was removed

* All record references are to the joint appendix filed in the United States Court of Appeals for the Second Circuit.

to the federal court, petitioner moved to vacate the warrant of attachment and the levy thereunder and to set aside service of the summons on the ground, *inter alia*, that petitioner's funds were not subject to attachment under New York law, since these funds were devoted to governmental, rather than proprietary, purposes (R. 44a-65a, 74a-114a).

Both New York and Washington have well-defined policies restricting the forum for suing public instrumentalities. In New York, many such instrumentalities may be sued only in the Court of Claims, see *Easley* v. *New York State Thruway Authority*, 1 N. Y. 2d 374, 378-79, 135 N. E. 2d 572, 574-75 (1956), and this rule is adhered to strictly. *Cf. Benz* v. *New York State Thruway Authority*, 9 N. Y. 2d 486, 174 N. E. 2d 727 (1961), *cert. dismissed*, 369 U. S. 147 (1962). Those instrumentalities which may be sued outside the Court of Claims are protected by strict venue requirements. New York Civil Practice Law and Rules § 505(a). Municipal corporations—which are treated, for purposes of governmental immunity, in the same category as petitioner (Op. 31a)*—may be sued only in the county in which they are situated. New York Civil Practice Law and Rules § 504.**. Washington also restricts the forum in which suits may be brought against its instrumentalities. Specifically, it has provided that suits against petitioner must be brought in its own county. Revised Code of Washington, Title 54.16.110. Thus, it is apparent that neither State would favor exposing a public instrumentality to suit in a distant forum.

The policies of the two States are also similar in that neither will allow attachment of public funds. Washington has exempted the petitioner's property from execution by statute (Op. 16a) and New York, by its case law, has indicated the same policy for its instrumentalities (Op. 46a).

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* For the convenience of the Court, we have cited portions of the opinion below by referring to the pages of the petition for certiorari where these portions are reproduced.

** Before September 1, 1963, this provision was embodied in New York Civil Practice Act § 182-a.

For suits in the New York Court of Claims, attachments are permitted only by the State, not against it or its agencies. Court of Claims Act § 20(3). It is plain that neither State favors attachment—and Washington, in this instance, clearly has forbidden it.

B. Opinions Below.

The District Court decided that the attached funds were held in a governmental capacity, and it therefore granted petitioner's motion (R. 115a-126a). 207 F. Supp. 443 (S.D.N.Y. 1962).

The Court of Appeals for the Second Circuit agreed with the District Court that the attached funds were devoted to governmental purposes (Op. 33a), but it nevertheless reversed the order granting petitioner's motion. 319 F. 2d 94 (2d Cir. 1963).

The Court stated that the New York cases "cannot form a reliable basis for the formulation of the policy of the State of New York that governs the decision of this case" (Op. 30a) and held, by its "own independent analysis" (Op. 32a), that "a levy under an attachment in a *quasi-in-rem* proceeding against an out-of-state governmental instrumentality will be permitted to stand unless its effect will be substantially to interfere with the performance of the public duties of such instrumentality" (Op. 52a). It remanded the case for reexamination of the facts in light of the new principle set forth in its opinion.

Subsequently, the Court granted the parties permission to file additional briefs because "there was little or no reference" in the original briefs to some of the questions discussed in the Court's opinion (Op. 53a). After these briefs were filed, the Court adhered to its original opinion and denied a petition for rehearing (Op. 54a). A petition for rehearing *in banc* was denied, with three judges dissenting and a fourth judge not participating in the consideration of the petition (Op. 58a).

Interest of the State of New York

The interests of the State of New York have been affected substantially and adversely by the Court of Appeals' holding. In particular, the State would be injured in three vital respects.

First, it appears likely that deposits by municipalities, counties, villages and public instrumentalities of other states would be transferred from New York banks to banks in states whose law gives greater scope to the doctrine of governmental exemption. If such deposits were left in New York banks, they would be liable to attachment under the Court's holding—and it would be disadvantageous to public bodies to keep their deposits in New York under these conditions. The transfer of these public funds to banks outside New York State would be inimical to the commercial life of the State and harmful to the best interest of its people.*

Second, the deposits of public bodies of New York State itself would be subject to attachment within the State under this holding. Indeed, the Court purportedly developed its "substantial interference" test from cases which fashioned the principle of governmental immunity for municipalities within New York (Op. 46a). Since the holding determines New York local law, its effect will not only bind the lower federal courts but it is likely to set a very important precedent for the state courts, too, in matters involving New York municipalities, counties, villages and instrumentalities.

Third, deposits of New York public instrumentalities in other states may receive less protection, as a result of the

* At the close of 1962, a total of over $2,106,700,000 was deposited in New York banks by states and political subdivisions thereof. Letters, dated May 29, 1963, from C. B. Reiman, Deputy Comptroller of the Currency, U. S. Treasury, and Boris S. Berkovitch, Deputy Superintendent of Banks, N. Y. State. We are informed that there is no further break-down of this figure.

holding below. It is hardly likely that another state will accord such deposits greater protection from attachment than they would receive in New York, and it is even more unlikely that another State would accord New York's deposits greater protection than that State's public deposits would receive in New York. In such a situation, it seems probable that other states would look to New York law and would accord the deposits of New York public bodies only the residual protection from attachment embodied in the proposed principle set forth in the Court's opinion.

Finally, we would note with special emphasis that the holding below may well be the final word on New York law for many years to come. As petitioner pointed out in its petition for certiorari, at page 21, a new amendment to Fed. R. Civ. P. 4(e) now makes it possible for a plaintiff to commence a *quasi-in-rem* proceeding directly in a federal court. An attaching plaintiff will take advantage of this amendment in view of the decision below, and will avoid the State courts. In light of this fact, the interest of the State in securing a review of the holding becomes even more grave.

ARGUMENT

The judgment of the Court below unjustifiably subjected funds of a state instrumentality to attachment in another state. The Court of Appeals' holding, unless it is corrected on review by this Court, will permit private litigants to seize governmental funds in advance of trial and to harass public bodies by suing them in inconvenient forums.

We respectfully submit that the Court of Appeals erred in opening the federal courts to *quasi-in-rem* suits against governmental instrumentalities, and that this case presents a matter of great public importance.

We believe that the New York courts, if faced with the instant case, would not have exposed petitioner's funds to attachment. Under New York precedent—and the reasons which underlie it—such funds are exempt from levy. The attachment here also runs contrary to the policy of the State of Washington, which, while abjuring sovereign immunity, restricts the forum for suing public bodies and protects their funds from process. Under these conditions, New York, both in its own interest and in the spirit of comity, would have vacated the attachment herein.

(A)

As the Court of Appeals frankly recognized in its opinion (Op. 44a-45a), existing New York precedent would make the validity of the attachment turn on whether petitioner acquired the attached funds through "governmental" activities, on the one hand, or "proprietary" activities, on the other. *See Van Horn* v. *Kittitas County*, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. N. Y. Co.), *aff'd on opinion below*, 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dept. 1899); *Doyle* v. *City of Astoria*, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. N. Y. Co. 1932), *aff'd*, 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dept. 1933); *Harman* v. *City of Ft. Lauderdale*, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. N. Y. Co. 1929); 10 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 135 (1954). *Cf. Leonard* v. *City of Brooklyn*, 71 N. Y. 498, 500 (1877); *Darlington* v. *Mayor of City of New York*, 31 N. Y. 164, 192-93 (1865); *Matter of Donner-Hanna Coke Corp.* v. *Eberhardt*, 156 Misc. 41, 42-43, 280 N. Y. Supp. 607, 609 (Sup. Ct. Erie Co. 1935). The Court held, however, that these cases "cannot form a reliable basis for the formulation of the policy of the State of New York that governs the decision of this case" (Op. 30a), and it went on to discuss the principles which, in its view, govern the New York cases.

We submit that the policies which govern these cases—as well as the explicit language of the cases themselves—

make it clear that the New York courts will vacate any attachment of funds held by a public body for its governmental purposes.

An attachment is an "involuntary dispossession of the defendant prior to any adjudication of the rights of the plaintiff, that is, a seizure, in advance of trial and judgment." 6 Am. Jur. 2d, *Attachment and Garnishment* § 1 (1963). Thus, there are two aspects to an attachment which militate against applying it to funds held by a public body. First, the attachment may tie up public funds for the duration of an action. The workings of a governmental unit may be stifled even though it ultimately is adjudged free of liability; and, irrespective of its liability on the merits, the funds attached may be vital for public use. Second, an attachment forces the governmental unit to litigate in the form where its funds are attached—or else forfeit these funds to the plaintiff. The public body thus is compelled either to abandon any effective policy restricting the forum in which it may be sued or to limit the areas in which it extends credits or makes deposits. Neither course, obviously, is conducive to the efficient functioning of government. To be sure, a governmental unit may not enter the realm of private activity and there claim exemption from process; but the New York rule covers this eventuality by removing the exemption in such a case. Where governmental functions are involved, however, there is a need for exemption—if state policy is not to be thwarted.

The policy considerations we have advanced are by no means hypothetical. As we have already pointed out, they are inherent in the law of both Washington and New York. And, we submit, these considerations are not met by the test of "substantial interference" proposed in the opinion below.

Contrary to the Court of Appeals' decision, the threat to public funds posed by attachment is not obviated when

funds are "set aside" (Op. 48a) to meet a particular obligation which has been fulfilled. Aside from the insuperable difficulties of determining whether or not certain funds are "essential" to the performance of public functions, there would seem to be little difference between a fund which has been "set aside" for a particular purpose and any other item of expected expenditures in the budget of a public body. If such an item should turn out to have been overestimated, would the general revenues of that body become subject to a tachment to the extent of the overestimation? Surely not; in fact, the Court's opinion clearly recognizes this (Op. 48a). Neither revenues nor expenditures can be estimated with sufficient precision to allow such a test. Such funds are to be used, as is every other asset of the petitioner, for general public functions. Any other view of such funds would turn budgetary estimates into a straitjacket for governmental units.

Neither does the Court of Appeals' proposed test avoid the threat to both the Washington and the New York policies limiting the forum for suits against public instrumentalities. Obviously, one of the aims of New York's policy restricting attachment against governmental units is the desire to avoid harassment of public bodies by subjecting them to trial in distant or inconvenient forums. See *Harman* v. *City of Ft. Lauderdale*, *supra*, 134 Misc. at 137, 234 N. Y. Supp. at 200. *Cf. W. K. Terry & Co.* v. *Hyde County*, 33 Ohio App. 118, 168 N. E. 562, 563 (1929). New York, in fact, requires that suits against certain of its instrumentalities must be brought in the Court of Claims, where there are special procedures to protect the public from ill-founded suits. See, *e.g.*, Court of Claims Act §§ 10, 11. And, as we have pointed out, suits against its municipalities are also restricted as to venue. It is unthinkable that New York would disregard Washington's policy, in light of the strength of its own interest in re-

stricting the forum for such suits. *Cf. Benz* v. *New York State Thruway Authority, supra.*

It is somewhat paradoxical that the states whose policies are at issue here, New York and Washington, are the two states who have led the way in waiving sovereign immunity. Significantly, both have seen fit to retain strong limits on attaching public property and on venue of actions against governmental bodies. It would hardly serve the cause of a more liberal view of sovereign immunity if these reasonable limitations could be evaded in an out-of-state forum. *Cf. Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 54 (1954); *Easley* v. *New York State Thruway Authority, supra*, 1 N. Y. 2d at 376-77, 135 N. E. 2d at 573. And, certainly, neither State would undermine the limitations set by the other.

(B)

We have already indicated the likelihood that New York would be guided not only by its own strong policy against the instant attachment, but also by a respect for the limitations which Washington has set for suits against its instrumentalities.

Even if the New York Court of Appeals' holding in *Morris Plan Industrial Bank* v. *Gunning*, 295 N. Y. 324, 331-32, 67 N. E. 2d 510, 513 (1946), were extended to apply New York local law to attachment of an out-of-state public instrumentality, there would be no bar to taking into account Washington policy in formulating the rule of New York law that is to govern this case. Indeed, the opinion below pointed this out (Op. 29a n.2). And the New York Court of Appeals, too, has indicated that there is no firm line between "substance" and "procedure" in choice-of-law problems; the distinction depends in each case upon New York policy. *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34, 41, 172 N. E. 2d 526, 529 (1961). *Cf. Pearson* v. *Northeast Airlines*, 309 F. 2d 553, 560 (2d Cir. 1962), *cert. denied*, 372

U. S. 912 (1963). In light of the similarity between New York and Washington policy, there seems little doubt but that New York would bar the instant attachment—no matter what view one takes of the choice-of-law problems in this case.

We wish to point out, finally, the inextricable relation between the success of New York's own policy and its willingness to accord respect to Washington's desire to keep governmental property from attachment and to prevent lawsuits against public bodies in forums across the continent. If New York disregards Washington's statutes, it can expect no better treatment for its instrumentalities in other states. Indeed, if the Court of Appeals' original construction of New York law is adopted, New York instrumentalities' public property will be subject to attachment in their home state—and there is little reason why other states should accord them greater protection than they are given by their home state. Under these circumstances, the New York courts would be harming their own governmental bodies and their own legislature's policies by allowing this attachment. This, they have quite clearly indicated, they will not do. *Davenport* v. *Webb*, 11 N. Y. 2d 392, 395, 183 N. E. 2d 902, 904 (1962).

Whether on grounds of New York law alone, comity or choice of law, it is obvious that the New York courts, if faced by the instant question, would vacate the attachment. The state cases—the *Van Horn*, *Doyle* and *Harman* decisions—make it perfectly clear that funds acquired by a public body through its governmental activities are not subject to levy.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant certiorari to review the judgment below.

Dated: New York, New York, November 27, 1963.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Petitioner,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PAGE

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Wagner v. Braunsberg (1st Dept. 1958) 5 A. D. 2d 564, 173 N. Y. Supp. 2d 525 6

Constitution, Statutes and Rules

Constitution of the United States, Art. IV, Sec. 1 ..... 6n
New York Business Corporation Law, §1314(b) 6
New York Civil Practice Act, §912 2
New York Civil Practice Law and Rules, §302 6
New York General Corporation Law §225 6

Supreme Court Rules:
Rule 19 1(b) 7
Rule 42(4) 7

Other Authorities

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *Amicus Curiae*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 5, 6n

10 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE (1954) §91 p. 135 4

FORDHAM, LOCAL GOVERNMENT LAW (1949) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Three principal suggestions emerge from the Brief for Respondent in Opposition. Respondent suggests that:

1. The Court of Appeals "was required to decide a question of New York law without the guidance of decisions by New York's highest court", and that this Court should therefore give special weight to the Court of Appeals' expert status as to the laws of states within its circuit (Brief in Opposition, pp. 6-13); that

2. The precedent established by the Court of Appeals is unimportant because it is not of general application (*id.* pp. 16-18); and that

3. It is the responsibility of the New York Legislature to undo any mischief that may have been wrought by the decision of the Court of Appeals (*id.* p. 19).

There is no merit in any of these suggestions.

I

In suggesting that the Court of Appeals was required to act "without the guidance of decisions by New York's highest court" (Brief in Opposition, pp. 6-7), respondent overlooks two salient considerations:

First, the doctrine that an attachment may not be levied upon property "exempt from levy or sale by virtue of an execution" is set forth in Section 912 of the New York Civil Practice Act, and requires no judicial interpretation (Petition, pp. 3, 8).

Second, such exemption from levy—in the absence of an express statute—for property of a state instrumentality devoted to public use was established by New York's highest court in 1877 (*Leonard* v. *City of Brooklyn*, 71 N. Y. 498) and has never been challenged in that state (Petition, pp. 8, 10-11). Indeed, as noted in the excerpt from Dean Fordham's treatise cited at page 8 of the Petition, it is an almost universal American doctrine that "property of a unit of local government presently devoted to a public use and appropriate to that end is free from execution."

Respondent quotes from the Special Term's opinion in *Doyle v. City of Astoria, Ore.*, to the effect it had not there been established "that the attachment levied by the plaintiff prevented the municipality from continuing to function" (Brief in Opposition, p. 9). The quotation is out of context, its use misleading. In that case, the defendant municipality had separately contended that the funds in question were exempt from attachment because (a) they were trust funds, and (b) they were held by the municipality in its governmental—rather than proprietary—capacity. It appears from the opinion that the validity of the trust theory was in part dependent upon a showing that the municipality was unable to replace with other moneys the funds that had been attached in New York.[1] Thus, in proper context, the Special Term observed (147 Misc. at 128, 262 N. Y. Supp. at 573):

> "The affidavits submitted fall short, however, of establishing any trust. Though forwarded to the Chase Bank 'to pay City of Astoria, Oregon Water Bonds,' the money must nevertheless be treated as part of the free funds of the municipality, held in its corporate capacity, and subject to its control. There is no evidence that the debt limit had been exceeded and that further taxation would be impossible, nor any proof that the attachment levied by the plaintiff prevented the municipality from continuing to function."

The Special Term then went on to consider the wholly separate question whether the city had established that the funds attached were "devoted to a governmental purpose, and as such exempt from attachment" (147 Misc. at 128-

1. See also Papers on Appeal to Appellate Division, "Action No. 1" and "Action No. 2", at p. 12; fols. 35-36 (two separate actions on, so far as here relevant, identical papers were involved in the *Doyle* case).

129, 262 N. Y. Supp. at 573). Concluding that governmental purpose had not been established, the Special Term denied the motion to vacate the attachment. The briefs on appeal to the Appellate Division disclose that the trust argument was there abandoned (see Respondent *Doyle's* Brief, p. 11), and that the appeal turned on the question whether or not the moneys attached were "public funds" (see Appellant *City's* Point II, pp. 5-9; Respondent *Doyle's* Point I, pp. 3-10). Neither side, on that appeal, made any reference to the question whether the attachment "prevented the municipality from continuing to function", or to the Special Term's observation in that regard.

Not one of the decisions discussed at pages 8 to 10 of the Brief in Opposition lends support to the thought that New York courts would countenance an examination of the necessity in each case as a condition of exemption from attachment of governmental property devoted to public use.[2] On the contrary, two of them (*Doyle* and *Harman*) expressly make the attachability of a foreign municipality's property depend on a finding that such property is held "in its private or proprietary capacity" (*Doyle*, 147 Misc. at 128, 262 N. Y. Supp. at 573; *Harman*, 134 Misc. at 135, 234 N. Y. Supp. at 198; see also CARMODY-WAIT as quoted at p. 9 of Petition). The third case (*Van Horn*) discussed by respondent quotes with approval a categorical declaration that it is "the settled doctrine of the law" that the "public property" of municipal corporations "cannot be seized un-

2. It is perhaps significant that respondent's counsel in the case at bar did not—before the Court of Appeals developed and formulated its novel theory—argue that a foreign municipality was required to establish specific interference with function as a condition of exemption from attachment of its governmental property devoted to public use (see opinions below, 207 F. Supp. 443 *passim*, Petition, pp. 1a-12a; 319 F. 2d at 113, Petition, pp. 51a, 53a).

der an execution against them" (28 Misc. at 335, 59 N. Y. Supp. at 884). When the case reached the Appellate Division, that court—by affirming on opinion below—unanimously approved this declaration of the settled doctrine of the law concerning municipal corporations' public property (46 App. Div. 623, 61 N. Y. Supp. 1150).[3]

Those cases (*Doyle*, *Harman* and *Van Horn*) all deal with foreign municipal corporations. There is, therefore, no basis for respondent's suggestion (Brief in Opposition, p. 11) that New York would withhold from "a *foreign* municipal corporation" judicial protection which it regularly affords its own municipalities. Any such suggestion would —even in the absence of such authorities—be unthinkable where, as here, there is involved the instrumentality of a state whose relevant public policy is substantially identical with New York's (see Brief *Amicus Curiae* of the Attorney General of the State of New York, p. 3).

II

The suggestion that the Court of Appeals' decision constitutes a narrow holding without precedential value (Brief in Opposition, pp. 16-18) is hardly consistent with that court's avowed purpose to "formulate in precise terms" the controlling "rule of policy of the State of New York" (319 F. 2d at 103, Petition, p. 31a), or with its prediction that "the rule formulated by us this day

3. As noted in the Petition (pp. 5-6), both courts below found the funds here involved to constitute governmental property devoted to public use. See, *e.g.*, the portion of the Court of Appeals' opinion headed "UNDER NEW YORK LAW THE ACTIVITIES OF THE DISTRICT [PETITIONER] WERE GOVERNMENTAL AND NOT PROPRIETARY" (319 F. 2d at 104-109, Petition, pp. 33a-43a).

* * * rests on a solid foundation and will endure" (319 F. 2d at 113; Petition, p. 52a).

There is little merit in the contention (Brief in Opposition, pp. 17-18) that NEW YORK BUSINESS CORPORATION LAW §1314(b) minimizes the impact of the Court of Appeals' decision. That section—successor to GENERAL CORPORATION LAW §225—does not restrict actions brought in New York by residents or by domestic corporations who are assignees of foreign corporations. *McCauley* v. *Georgia Railroad Bank* (1924) 239 N. Y. 514, 147 N. E. 175. Thus, BUSINESS CORPORATION LAW §1314(b) would not bar suit by any New York resident or domestic corporation as assignee of respondent's cause of action. *Wagner* v. *Braunsberg* (1st Dept. 1958) 5 A. D. 2d 564, 566, 173 N. Y. Supp. 2d 525, 529.

Respondent also refers to New York CPLR §302 (Brief in Opposition, p. 17). That section deals only with *in personam* jurisdiction.[4] It does not affect the use that can be made of attachment as a means of obtaining *quasi-in-rem* jurisdiction over foreign defendants. Its existence in no way diminishes the urgent necessity of correcting the Court of Appeals' decision, which—in a way in conflict with applicable state law—unduly extends, over the governmental instrumentalities of other states, the *quasi-in-rem* jurisdiction of United States district courts sitting in New York.

4 Generally accepted principles of comity as between states would prevent assertion of *in personam* jurisdiction over instrumentalities of sister states in litigation arising out of their governmental activities (see Brief *Amicus Curiae* of the Attorney General of the State of New York, pp. 3, 7, 9-11; Petition, p. 18 n. 6). Assertion of *in personam* jurisdiction over a state instrumentality exclusively engaged in governmental activity, and created pursuant to a statute consenting to suit only in a forum of the home state, would also give rise to a serious question under the Full Faith and Credit Clause (CONSTITUTION OF THE UNITED STATES, ART. IV, SEC. 1).

III

Perhaps the most startling aspect of respondent's argument is the suggestion that it is the responsibility of the New York Legislature to repair any mischief that the Court of Appeals may have wrought; and that the Attorney General of the State of New York should—instead, perhaps, of laying his views before this Court pursuant to Rule 42(4) of the Supreme Court Rules—look to the Legislature for corrective legislation (Brief in Opposition, p. 19).

If there were merit in such a suggestion, Rule 19.1(b) of the Supreme Court Rules would be meaningless. In any case where a court of appeals has decided "an important state or territorial question in a way in conflict with applicable state or territorial law", the state or territorial legislature can, if it wishes, remedy the mischief by corrective legislation. However, to the many and varied burdens which rest upon the legislatures of the several states and territories there should not, we submit, be added the burden of rectifying decisions of the United States courts of appeals.

In conclusion, we take brief note of respondent's repeated attempts—successful in the court below (see Petition, p. 15, n. 5)—to inject into this jurisdictional issue questionable allegations concerning the merits. For example, in the footnote to page 15 of its brief, respondent asserts: "The acceptance of the work as completed by the District's [petitioner's] engineers is binding upon the Dis-

trict [petitioner]." Respondent supports this proposition with a Washington Supreme Court 1914 decision. However, a 1915 amendment of the pertinent statute provides that a public body cannot be bound except by its own affirmative action in accepting the contractor's work as completed. *National Blower & Sheet Metal Co.* v. *American Surety Co.* (1952) 41 Wash. 2d 260, 264, 248 P. 2d 547, 549. In the instant case, petitioner has refused to accept the so-called certificate tendered by the engineer, and has refused to accept respondent's work as completed (see *Affidavit of Myles C. McGough in Support of Plaintiff's Application for a Warrant of Attachment*, Joint Appendix, p. 33a; Petitioner's RESOLUTION No. 952, *id.* pp. 58a-63a). The validity of petitioner's position in so refusing will be a principal issue in this lawsuit, wherever it comes to trial (see Petition, p. 5, and n. 2).

There is not in this case—and never has been—any question whether petitioner may "insulate itself from the payment of its just debts" (compare Brief in Opposition, pp. 12-13). The Washington State Legislature has specifically provided that petitioner "may be sued in the county in which it is located" (Petition, p. 66a).

Nor is there merit in respondent's suggestion (Brief in Opposition, pp. 15-16) that the petition is premature. The question here presented—a question which must be answered at this time if petitioner is to get the protection of the correct rule of law (*cf.* Petition, p. 21)—is whether petitioner may be compelled, contrary to applicable New York law, to satisfy a court in New York of its particular need for the $47,000,000 respondent has attached, in order to

avoid having to defend this lawsuit in a forum not designated by the Washington State Legislature.

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OCTOBER TERM, 1963

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PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, *Petitioner,*

against

MERRITT-CHAPMAN & SCOTT CORPORATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S REPLY TO THE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*

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IN THE

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RESPONDENT'S REPLY TO THE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*

Preliminary Statement

Respondent Merritt-Chapman & Scott Corporation (M-C&S) received the brief of the Attorney General of the State of New York (Attorney General), as *amicus curiae*, in support of the Petition only after M-C&S's brief in opposition had already been served and filed. Because the Attorney General has misstated the question presented in this case and because he has raised several new points not argued in the Petition, M-C&S is submitting this short reply brief.

Clarification of the Question Presented

By the omission of facts central to a decision of this case, the Attorney General has stated the question pre-

sented in such oversimplified terms as to be misleading. The only way the argumentative question set forth by the Attorney General (*Amicus* Brief, pp. 1-2) could be related to the instant case is by the addition of at least the following language, shown in italics:

> "May a plaintiff commence an action in New York *for breach of a contract made in New York* against a public instrumentality of another State simply by attaching that instrumentality's New York bank deposits, *which have been segregated from the general revenues of the public instrumentality and deposited in New York for payment of its obligations under the contract upon which the suit has been brought, where the attachment will not substantially interfere with the instrumentality's performance of its public duties*, thereby * * *" (*ibid.*; words in italics added by M-C&S).

Indeed, the Attorney General has never once acknowledged that this is an action upon a contract made in New York involving the interpretation of New York practice and remedial statutes, an action with which, in the words of the court below, New York has "substantial contacts" (Appendix A to Petition, p. 56a). Nor has the Attorney General apparently understood that this case does not involve a municipal corporation's budgetary estimates or an attachment of its general funds but an attachment of segregated funds which are not available for the municipal corporation's general public functions, such funds having been specifically appropriated for the payment of its obligations under the contract which is the subject of this suit.

New Matters Raised by the Attorney General

a) The Interests of the State of New York

The Attorney General argues that the interests of New York State are adversely affected in that: 1) out-of-state instrumentalities may transfer funds from New York

banks to banks in other states; 2) funds of New York public bodies may be subject to attachment within New York State; and 3) funds of New York public instrumentalities in other states may receive less protection. (*Amicus* Brief, pp. 5-6).

Little need be said about the speculative possibilities set out as 1) and 3), *supra*. They were properly described by the court below as "farfetched" (Appendix A to Petition, p. 56a). Indeed, they are incomprehensible since the courts of other states have since 1935 considered New York courts to be "too liberal in their treatment of a foreign municipal corporation's creditors" in attachment suits, see *Eastern Union Co. v. Moffat Tunnel Improvement Dist.*, 178 Atl. 864, 871 (Del. 1935); and there is no evidence whatsoever that the New York financial community or New York public bodies have been adversely affected by this out-of-state recognition of New York policy sanctioning the attachment of the funds in New York of a foreign municipal corporation.*

The Attorney General's second concern, *i.e.*, the possible attachment of funds of New York governmental units within New York, shows unfamiliarity with the record and with what was decided by the Court of Appeals. No such issue was presented to or decided by the court below.

b) The Venue of this Action

The Attorney General argues that the State of Washington has by statute restricted the forum in which suits may be brought against its instrumentalities (*Amicus* Brief, p. 3) and that it "is unthinkable that New York would disregard Washington's policy." (*Id.*, p. 9). Con-

* The Attorney General's predictions as to the consequences of the Court of Appeals' decision involve, basically, legislative considerations. If future events demonstrate that the Attorney General's fears are not "farfetched", he has ready access to the New York State legislature which, by a minor change in the practice statutes involved, can grant whatever relief may then be appropriate.

trary to the Attorney General's argument, the highest court of the State of Washington has construed the statute relied upon by the Attorney General (*id.*, p. 3) to concern only the procedural matter of venue and to raise no substantive jurisdictional issues. *Public Utility District No. 1 v. Puget Sound Power & Light Co.*, 260 P. 2d 315 (Wash. 1953). A venue provision of this kind has no extraterritorial application. *Tennessee Coal, Iron & RR. Co. v. George*, 233 U. S. 354 (1914). As the court below pointed out, the question whether a foreign governmental body can be sued in New York State has been settled by New York courts in the affirmative since 1899; see Appendix A to Petition, page 57a, fn. 4.*

To cite *Kilberg* v. *Northeast Airlines*, 172 N.E. 2d 526 (N. Y. 1961) and *Pearson* v. *Northeast Airlines*, 309 F. 2d 553 (2d Cir. 1962), *cert. den.* 372 U. S. 912 (1963) in support of an argument that New York courts would deny M-C&S a remedy is unsound (*Amicus* Brief, pp. 10-11). In those cases, the state and federal courts permitted New York remedial policy to override the clear provisions of Massachusetts statutory law. Their combined effort is to undercut fatally the Attorney General's argument here.

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Respectfully submitted,

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* The validity of the attachment and levy is a constitutionally procedural matter for New York conflict of law purposes, and New York would not defer to any policy of the State of Washington. See Appendix A to Petition, page 29a and Respondent's Brief, page 11.